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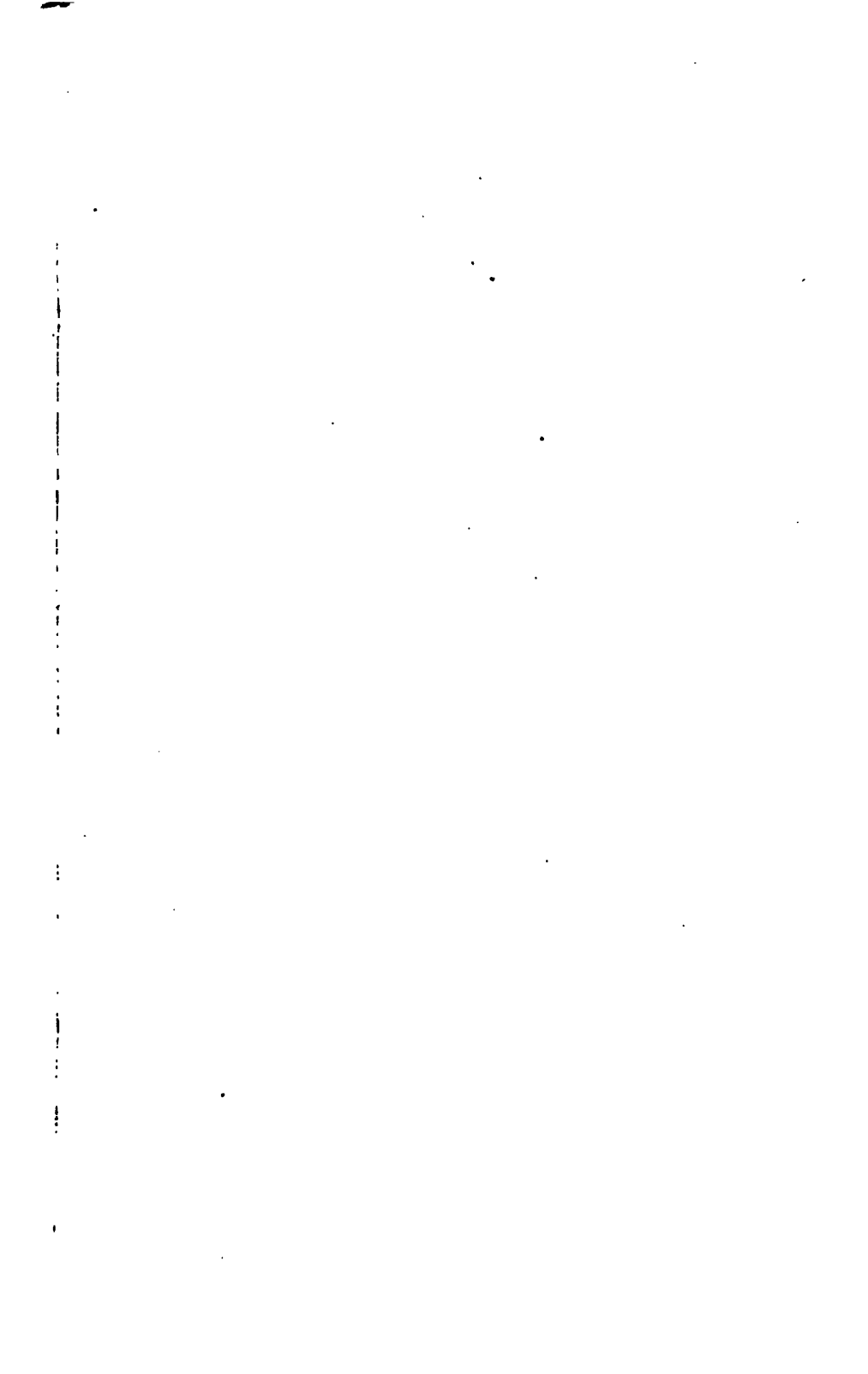
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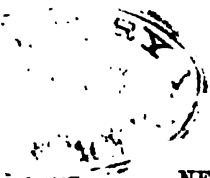




**SPEECHES, ARGUMENTS,**  
**AND**  
**MISCELLANEOUS PAPERS**  
**OF**  
**DAVID DUDLEY FIELD.**

**EDITED BY**  
**A. P. SPRAGUE.**

**VOLUME I.**



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## PREFACE.

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THIS compilation was undertaken, as the title-page indicates, by Mr. A. P. Sprague. He had proceeded beyond the half of the second volume, when the work was interrupted by his sudden death. The loss was a severe one, for he was a young man of much promise, and had distinguished himself by winning the prize offered by M. Marcuato, of Spain, through the Association for the Reform and Codification of the Law of Nations, for the best essay upon the codification of public International Law. His death interrupted for a time the completion of the present work. It was his intention to insert a preliminary essay, but the materials were not sufficiently collected and arranged to be of use in other hands.

The selections for these volumes have been made from a large mass of material, and they sufficiently explain themselves. Many of the controversies to which the papers relate have been settled by time and circumstance; but it was thought that the republication might serve a useful purpose, by way of suggestion at least, toward a history of opinion and struggle, in periods of great importance.



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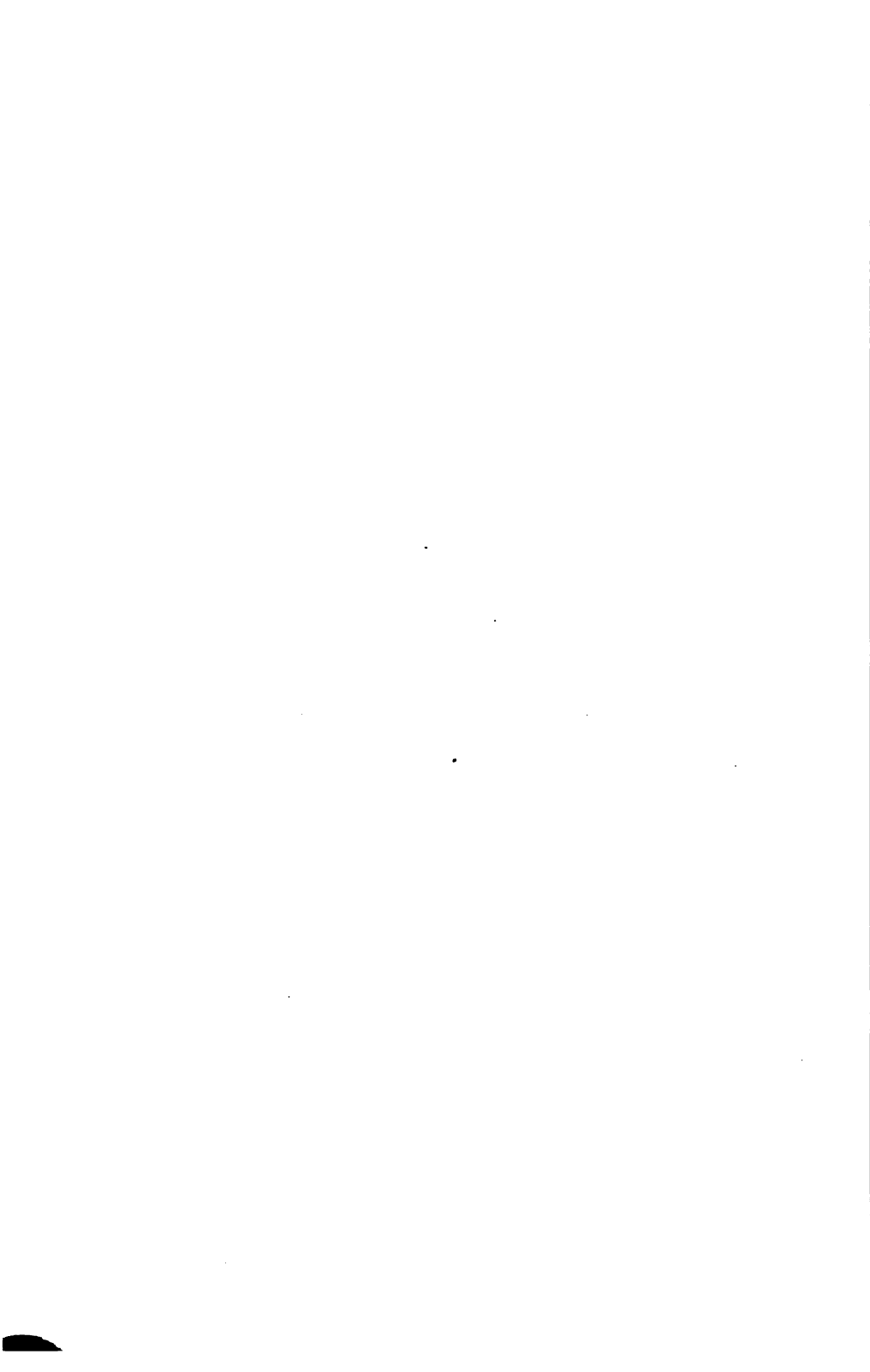
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PART I.

*ARGUMENTS ON CONSTITUTIONAL QUESTIONS IN THE  
SUPREME COURT OF THE UNITED STATES.*





# CONSTITUTIONAL QUESTIONS

IN THE

SUPREME COURT OF THE UNITED STATES.

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## THE MILLIGAN CASE,

1867.

LAMDEN P. MILLIGAN, a resident of Indiana and a citizen of the United States, was arrested at his home October 5, 1864, by order of the military commandant of his district, and imprisoned at Indianapolis. He was placed on trial October 21st before a "military commission" at Indianapolis, upon charges of "conspiracy against the Government of the United States; affording aid and comfort to rebels against the authority of the United States; inciting insurrection; disloyal practices and violation of the laws of war." Objection to the jurisdiction of the commission was overruled, and Milligan was convicted and sentenced to death by hanging. The sentence was approved by the President, and he was ordered to be executed May 19, 1865. On May 10th, however, a petition was filed by him in the Circuit Court of the United States for Indiana, showing that a grand jury of that Court had convened after his arrest but that no indictment against him had been found; that he had at no time been in the military, naval, or militia service, nor within any State engaged in rebellion against the United States at any time during the war. The petition demanded that Milligan be delivered to the proper civil tribunal to be tried, or discharged from custody.

The Acts of Congress bearing upon this case were: 1. The Judiciary Act of 1789, § 14, by which the Circuit Courts are empowered to issue writs of *habeas corpus*; and 2. The act of March 3, 1863, "relating to *habeas corpus*," etc., passed during the rebellion. The latter act authorized the President to suspend the writ of *habeas corpus* during the rebellion, subject to the following limitations: Lists of prisoners, in States where the administration of justice has not been disturbed, are to be presented to the Judges of the United States Circuit and District Courts; and where the grand jury, in attendance upon such Courts, terminates its sessions without proceeding against the prisoners, they are to be discharged upon a recognizance to keep the peace, or to appear before the Court when directed. In case the lists of prisoners are not furnished or the grand jury adjourns without indictment, the prisoners are entitled to a discharge upon the conditions mentioned.

The President suspended the writ of *habeas corpus*, by proclamation of September 15th, following this act, in cases where military, naval, and civil officers of the United States, held "persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy."

The principal questions arising in the case were: 1. Ought the writ of *habeas corpus* to issue? 2. Ought Milligan to be discharged from custody? and, 3. Had the military commission jurisdiction to try and sentence Milligan? The Supreme Court of the United States answered the first two questions in the affirmative, and the last in the negative.

Associated with Mr. Field were Judge Black and General Garfield, late President of the United States. On the other side were the Attorney-General and General Butler.

If the Court please—

Before I say anything else, let me, on behalf of my brethren and myself, thank the Court for its indulgence, both in respect to the early argument of these cases, and in respect to the time allowed for their discussion. While we are aware that, but for the magnitude of the cases themselves, this indulgence would not have been granted, we are none the less sensible of your courtesy and kindness.

Let me say next, that some things have been brought into this discussion which have no proper place in it, and which, for my part, I shall endeavor to keep out of it. I shall presently state what I suppose the question to be; I will first state what it is not: It is not a question of the discipline of camps; it is not a question of the government of armies in the field; it is not a question respecting the power of a conqueror over conquered armies or conquered States. What may or may not be the rightful interference of the military in the States lately in rebellion—to what extent they may go, how long continue, and when and how cease to act—are not questions in this case.

Nor is it a question, as my learned friend who opened the cause on the other side (General Butler) stated, what shall be the condition of the emancipated slaves. Their freedom is placed beyond all peradventure by the great constitutional amendment, if we shall be so happy as to preserve the Constitution itself intact and supreme.

Nor is it a question how far the *legislative department* of the Government can deal with the question of martial rule. Whatever has been done in these cases has been done by the executive department alone. It did not wait for Congress to

act, and when Congress acted it did not regard its action. When the judiciary acted, it did not respect its mandate. It disregarded the authority of the learned Judge in the First Circuit; it disregarded the authority of the late Chief Justice in the Fourth Circuit; and I believe it is well understood that, if the *habeas corpus* in these cases had been issued, it would have been disregarded.

Nor, may it please the Court, is it a question of the patriotism, or the character, or the services of the late Chief Magistrate, or of his constitutional advisers. It is known to you, sir (addressing the Chief Justice), that I ventured to call myself a personal friend of the late President, and I was happy to believe that he so regarded me. I did not conceal from him my dislike and fear of the extent to which some of his subordinate officers were carrying the military power; but this did not diminish my personal regard for him, nor, as I believe, his friendship for me. His great heart, his forgiving spirit, his sagacious touch of the chords of public sentiment, and his unexampled patience made him a popular idol; and the manner of his death canonized him. He is far above any praise or blame of mine. The quiet grave where he reposes after the storm of this awful conflict will be a shrine for his countrymen, so long as they have a country; and the swarthy race which he did so much to emancipate will visit it in long succession, through uncounted ages, as the burial-place of their deliverer.

Nor do we cast any reflection upon the Secretary of War. It has been my fortune to be with him in some of the darkest hours of the tempest, and I can bear personal witness to his indomitable energy, to the erect front which he maintained against all disaster, to his industry which knew no weariness, and to his absolute devotion to the public service. Next to the President himself, and to the illustrious man who organized that gigantic system of finance which carried us through the war without a shock to the public credit, to the amazement of the Old World, and the admiration of the New; next, I say, after the great President and his minister of finance, the country owes more to the Secretary of War than to any other civilian. His services may be, for the time, lost in the blaze of military



glory. His laborious days, and the plain building where he passed them, are now eclipsed by the clouds that rolled from the fields of Vicksburg and Shiloh, from Gettysburg and Antietam, from Atlanta and Petersburg; but, when history writes the record of this war, we shall find there, in light, the name of EDWIN M. STANTON.

It would hardly be respectful in me to disclaim, for these cases, in this presence, all political significance whatever. The characters and the general party affinities of the different counsel are, of themselves, a sufficient guarantee against it. Not to speak of the other counsel, we have, on one hand, the General (Butler) whose services in the beginning of the war, whose promptitude in coming to the rescue of this capital, and whose administration in the Department of the Gulf, make a part of the history of the country; while, on the other hand, we have the General (Garfield) who, in the disastrous day of Chickamauga, stood by the side of Thomas, when, with his indomitable infantry, he rolled back the successive charges of the rebel battalions.

This is a question which concerns the future rather than the past; what is to be, more than what has been. What is done, is done—gone for ever into the unchangeable and inexorable past. But the present is here, and the future is before us. For one, so glad am I to have emerged from the thick darkness of war, into this abundant light of peace, and so confident am I of the policy of forgiveness or oblivion, that I am willing to agree, with all my brethren, to let bygones be bygones, now and evermore.

Here are three men suffering in prison, who claim that they are held by unlawful force. This claim must be heard. The American people, speaking through an amendment of their organic law, have just proclaimed with a louder voice than ever the right of every human being to be free, except in punishment for crime, whereof he shall have been duly convicted.

For the future, who can tell what may happen in a year, or a month, or a day? Our country is ninety years old, and sixteen of them were years of war. It is hardly supposable that we are to have hereafter so large a proportion of peaceful days. Even now a warlike nation is encamped upon our southern

border, and it requires all the wisdom of the most prudent men at this Capitol to prevent a collision on the Rio Grande. It behooves us to know what are to be our rights if war breaks out with France.

Is it true that the moment a declaration of war is made the executive department of this Government, without an Act of Congress, becomes absolute master of our liberties and our lives? Are we then subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone?

We may have had Presidents, arbitrary Secretaries of War, and cruel generals. Let us understand beforehand whether a state of war makes them our masters. These are the considerations which give to these cases their greatest significance.

But we are met with the PRELIMINARY OBJECTION, that, great and pressing as they are, you can not consider them for want of jurisdiction. The objection is twofold: first, that the Circuit Court of Indiana had not jurisdiction to hear the cases there presented; and, second, that this Court has not jurisdiction to hear and decide the questions thus certified.

*First*, as to the jurisdiction of the Circuit Court. That depended on the fourteenth section of the judiciary act of 1789, and on the Habeas Corpus Act of 1863.

The first clause of the fourteenth section is as follows: "All the before-mentioned Courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." This was held in *Bollman's case*,\* to authorize the writ only in aid of a jurisdiction otherwise given. Then comes the second clause in these words:

"And that either of the Justices of the Supreme Court, as well as the Judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." This clause was, in the same case,

\* 4 Cranch, 75.

held to authorize the Courts, as well as the Judges, to issue the writ for the purpose of inquiring into the cause of commitment.

"It would be strange," said Chief-Justice Marshall, "if the Judge, sitting on the bench, should be unable to hear a motion for this writ, when it might be openly made and openly discussed, and might yet retire to his chamber, and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of judicial proceedings." Under this section, therefore, the jurisdiction of the Circuit Court should seem to be complete.

The Act of March 3, 1863, after providing that the Secretaries of State and of War shall furnish to the Judges of the Circuit and District Courts a list of political and State prisoners, and of all others, except prisoners of war, goes on to declare that, if a grand jury has had a session, and has adjourned without finding an indictment, thereupon "it shall be the duty of the Judge of said Court forthwith to make an order that any such prisoner, desiring a discharge from said imprisonment, be brought before him to be discharged." The next section provides that, if the list is not furnished, any citizen may apply for the relief of the person imprisoned, "by a petition alleging the facts aforesaid."

Upon this act, the objection of my learned friend is, first, that the application of the petitioner should have been made to one of the *Judges* of the Circuit, instead of the *Court* itself; and, second, that the petition does not show whether it was made under the second or the third section.

To the former objection the answer is, first, that the decision in *Bollman's* case, just mentioned, covers this case, for the same reasoning which gives the *Court* power to proceed under the fourteenth section of the Act of 1789, gives the *Court* power to proceed under the second and third sections of the Act of 1863. The second answer is that, by the provisos of the second section, the Court is expressly mentioned as having the power, thus :

"*Provided, however,* That no person shall be discharged by virtue of the provisions of this act, until after he or she shall have taken an oath of allegiance to the Government of the United States, and to support the Con-

stitution thereof; and that he or she will not hereafter, in any way, encourage, or give aid and comfort to the present rebellion, or the supporters thereof."

"*And provided also*, That the *Judge or Court* before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required, to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said *Judge or Court*, to keep the peace and be of good behavior toward the United States and its citizens, and from time to time, and at such times as such *Judge or Court* may direct, appear before said *Judge or Court* to be further dealt with, according to law, as the circumstances may require."

My learned friend's other objection to the jurisdiction of the Circuit Court is, that the petition does not show under which section of the act it was presented. It states that the petitioner is held a prisoner under the authority of the President; that a term has been held, and that a grand jury has been in attendance and has adjourned without indicting; that is all. It does not state whether a list has been furnished to the Judges by the Secretary of State and the Secretary of War, and therefore, argues the learned counsel, the Court has no jurisdiction. That is to say, the Judges, knowing themselves whether the list has or has not been furnished, can not proceed, because forsooth we have not told them by our petition what they already know, and what we ourselves might not know, and perhaps could not know, because the law does not make it necessary that the list shall be filed or that anybody shall be informed of it but the Judges.

There is an old maxim of the law which would dispense with the averment, even if the fact were known to the petitioners: "*Lex non requirat verificari quod apparet curiæ*"—a maxim as old, at least, as Coke, and given by him in 9th Reports, p. 54. I think, therefore, I need not argue any further, that the Circuit Court of the United States for the District of Indiana had jurisdiction upon this petition.

Next, as to the jurisdiction of this Court. Supposing the Circuit Court to have had jurisdiction, has this Court jurisdiction to hear these questions as they are certified? There are various objections. First, it is said that a division of opinion can be certified only in a *cause*, and that this is not a *cause*.

You remember the Act of 1802, which authorized a certificate of division. It is in these words :

" Whenever *any question* shall occur before a Circuit Court, upon which the opinion of the Judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the *request of either party or their counsel*, be stated under the direction of the Judges, and certified under the seal of the Court, to the Supreme Court, at their next session to be held thereafter, and shall, by the said Court, be *finally decided*. And the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order ; provided, that nothing herein contained shall prevent *the cause* from proceeding, if, in the opinion of the Court, further proceedings can be, without prejudice to the merits," etc.

It was decided by this Court, in *Holmes vs. Jennison*,\* that a proceeding on *habeas corpus* is a suit, and suit is a more comprehensive word than cause.

Mr. STANBERRY : Will the gentleman allow me a word ?

Mr. FIELD : Certainly.

Mr. STANBERRY : I never said that a *habeas corpus*, after the return, when the parties appear and begin to try the case, is not a suit ; and that was *Holmes and Jennison*.

Mr. FIELD : Then the argument is that it is not a cause until the adverse party comes in. Is not a suit commenced before the defendant is brought into Court ? Is the defendant's appearance the first proceeding in a cause ? When a writ is issued to the Sheriff, we understand that the statute of limitations ceases to run. But my learned friend must allow me to read some other provisions of the statutes about *habeas corpus*. There have been three acts in respect to this writ : The first, of 1789, which I have already read ; then the act passed in 1833 ; and finally the Act of 1842. From the last act I will read the following passage :

" Either of the Justices of the Supreme Court of the United States, or judge of any District Court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined,

\* 14 Peters, 566.

or in custody, under or by any authority, or law, or process founded thereon, of the United States or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of said writ, and due proof of the service of notice of the said proceeding to the Attorney-General or other *officer prosecuting the pleas* of the State under whose authority the petitioner has been arrested, committed, or is held in custody, to be prescribed by the said justice or judge at the time of granting said writ, the said justice or judge shall proceed to hear the said *cause*," etc.

The second objection of my learned friend is that there must be parties, that is, at least *two parties*, and that here is only one. This argument is derived from the direction in the act, that the point must be stated "upon the request of either party" or their counsel. My friend says that "either party" imports two, and if there are not two there can be no certificate. This strikes me as altogether too literal: "*qui hæret in litera hæret in cortice*." The learned gentleman insists upon the grammar, but he can not render the language grammatical as it stands. It is "either party or their counsel." This is elliptical; what is meant is, "any party or parties, his or their counsel." Again: "either," if precisely used, would exclude all over two, because "either" strictly means "one of two"; and if there are three parties or more, as there may be, you can not have a certificate! It is not unusual in proceedings *in rem* to have several intervenors and claimants; what are we to do then? The answer must be, that "either" is an equivalent word for "any"; and that whoever may happen to be a party, whether he stand alone or with others, may ask for the certificate.

The words "either party" were introduced not for restriction but enlargement. The purpose was to enable *any* party to bring the case here; otherwise it might have been argued perhaps that *all* the parties must join in asking for the certificate. No, said Congress, any party having anything to do with the case may have it certified.

The reasoning of Chief-Justice Marshall, in respect to the *habeas corpus*, is here applicable. The words, "either of the

Justices of the Supreme Court," in the fourteenth section of the Act of 1789, were understood by him to have been used by way of enlargement, to provide for cases when the Court was not sitting; and he construed them, therefore, to embrace the Court, as well as the Judge. So, here, the language was introduced for the purpose of giving a more extended application to the statute. The purpose of the act was to prevent a failure of justice, when the two Judges of the Circuit Court were divided in opinion. The reason of the rule is as applicable to a case with one party as if there were two. Whether a question shall be certified to this Court, depends upon the point in controversy. If it concerns a matter of right, and not of discretion, there is as much reason for its being sent *ex parte*, as for its being sent *inter partes*. This very case is an illustration. Here a writ is applied for, or an order is asked. The Judges do not agree about the issue of the writ, or the granting of the order. Upon their action, the lives of these men depend. Shall there be a failure of justice? The question presented to the Circuit Court was not a merely formal one; whether an initial writ should issue. It is the practice, upon petitions for *habeas corpus*, to consider whether, upon the facts presented, the prisoners, if brought up, would be remanded. The presentation of the petition brings before the Court, at the outset, the merits, to a certain extent, of the whole case.\*

There may, indeed, be cases where only one party can appear, cases that are at first, and must always remain, *ex parte*. What shall be done with them? Such a case occurred not long ago in New York. A statute was passed, directing that students who received a diploma from Columbia College should be admitted to the bar, without further examination. A student applied to the Supreme Court of New York to be admitted. The application was refused. He appealed to the Court of Appeals, and the order was reversed. Here was a case where

\* That was the course pursued in *Passmore Williamson's case*, 1st Casey; in *Rex vs. Ennis*, 1 Burrows, 765; in the case of the Three Spanish Sailors, reported in 2 Wm. Blackstone, 1324; *Hobhouse's case*, reported in 2 Barnewall & Alderson, 420; *Husted's case*, reported in 1 Johnson, 326; *Ferguson's case*, 9 Johnson, 139; and in this Court, in *Watkins's case*, reported in 3 Peters, 202, where the disposition of the case turned upon the point whether, if the writ were issued, the petitioner would be remanded upon the facts as they appeared.

there could be but one party. There was no one but the applicant before the Court, no defendant, no contestant. Suppose that a question similar to that which has been argued here in Mr. Garland's case were to come before a Circuit Court, and that the learned Judges should be divided in opinion, upon the constitutionality of the test-oath, I should like to be informed, by my learned friend, whether he thinks that case could not be certified to this Court. Must the applicant be told that his application can not be decided ?

There is one view of this case in which it is to be regarded as essentially *ex parte*. You will observe that the application was for a writ of *habeas corpus* or for such other order or process as the Court might make for the deliverance of the party. If you allow the writ under the Judiciary Act, there may be a contestant ; if you proceed under the Act of 1863, there may not be a contestant, because the Judges are bound to discharge upon the fact of continued imprisonment, without indictment. The language of the act is, that if the list is furnished, "it shall be the duty of the Judge of said Court forthwith to make an order that any such prisoner, desiring a discharge from said imprisonment, be brought before him to be discharged." The third section declares, that the same thing shall be done on the application of a citizen, if the list is not furnished. Suppose that the party had asked simply for the order. It would have been *ex parte* of necessity ; the Government would have had no right to be heard ; no rights would have been determined, except that the man should go discharged of the particular imprisonment for which he was held. He might have been arrested the next day ; he might have been indicted. The lawgiver says, you shall not keep a man in prison longer than through the session of a grand jury, if it has not found an indictment against him ; and the moment the grand jury adjourns, if the Judge does not see that there is an indictment, he is bound to give a discharge. Neither General Hovey, the commandant of the District of Indiana, nor the President, nor any other officer of the Government, has a right to be heard against it.

Thus far, I have argued against this objection, as if there had been but one party before the Court ; but there were, in



fact, two parties. Who were they? The record tells us in these words :

"Be it remembered, that on the 10th day of May, A.D. 1865, in the Court aforesaid, before the Judges aforesaid, comes Jonathan W. Gordon, Esq., of counsel for said Bowles, and files here in open Court the petition of said Bowles to be discharged. . . . *At the same time comes also John Hanna, Esq., the attorney prosecuting the pleas of the United States in this behalf.* And thereupon, by agreement, this application is submitted to the Court, and day is given," etc.

The next day the case came on again, and the certificate was made. My learned friend asks, "Who is John Hanna, prosecuting the pleas of the United States?" Who is John Hanna? May I not as well ask who is the Attorney-General of the United States? I need not say, that this Court, judicially, knows who is the Attorney-General; and so the Circuit Court, judicially, knew that John Hanna was the District Attorney of the United States for the District of Indiana; and their judicial knowledge is your judicial knowledge, because you are to take all that they knew. But "prosecuting the pleas" is an expression which my friend does not understand. He asks what is meant by prosecuting the pleas of the United States. Let me see if I can not find something to satisfy him on that point. Here is the Habeas Corpus Act of 1842, which thus speaks :

"And upon the return of the said writ, and due proof of the service of notice of the said proceeding to the Attorney-General, or *other officer prosecuting the pleas* of the State, under whose authority the petitioner has been arrested," etc.

It would not be proper for me to say what took place in the Circuit Court, except so far as I get it from the record. I can imagine that, in a case of this gravity, the learned Judges, when the petition was presented, directed notice to be given to the law officer of the Government.

Notice, in like cases, is directed to be given by the Statutes of Indiana. They provide that, "when any person has an interest in the detention, the prisoner shall not be discharged, until the person having such interest is notified"; as you will find, if you look at the Revised Statutes of Indiana, page 196, section 728.

In point of fact, therefore, this cause had all the solemnity which two parties could give it. The Government came into Court and submitted the case in Indiana, for the very purpose of having it brought to Washington.

It has come here and argued the case, by the ablest counsel that could be had. It has brought, from the East, an able lawyer and gallant general, more interested in the question than any other person in the country; and, from the West, one of its greatest advocates; and with these appears the Attorney-General of the United States. After all this, is it not trifling with the Court, to say that it can not hear and decide this cause, because, forsooth, there is only one party before it!

The third objection which the learned counsel makes to the jurisdiction of this Court is, that no questions can be certified except those which arise upon *the trial*.

To this I answer first, that there has been a trial, in its proper sense, as applicable to this case. The facts are all before the Court. A return could not vary them. The case has been heard upon the petition, as if that contained all that need be known, or could be known. The practice is not peculiar to *habeas corpus*; it is the same on application for *mandamus*, or for attachments in cases of contempt, in both which cases the Court sometimes hears the whole matter on the first motion, and sometimes postpones it till formal pleadings are put in. In either case, the result is the same.

But, secondly, if it were not so, is it correct to say that a certificate can only be made upon a trial? To sustain this position, the counsel refers to the case of *Davis vs. Bruden*.\* But that case expressly reserves the question. Let me read from page 290: "We do not mean to decide," say the Court, "definitively, that no question can be brought here upon a certificate of division of opinion, unless the point arose upon the trial of the cause; but we are very much inclined to think that such is the true construction of the act; but, from the general words used, cases may possibly arise that we do not foresee. The question, however, brought up in the present case, being one resting entirely in the discretion of the Court, is clearly not within the act."

\* 10 Peters, 289.

So that it has not been decided that the point must arise upon the trial of a cause. I concede that it must arise in some part of the cause, some place in its progress, where a material question is brought before the Court, not a question resting in discretion, but a question of right material to the merits involved, and that I suppose to be the meaning of the learned judge (Mr. Justice Thompson), in that opinion.

My learned friend admits that the question of jurisdiction is a question that may be certified. The qualification which he insists upon is, that no question can be certified, unless it arose upon the trial of the cause, or be a question of jurisdiction. Well, this is a question of jurisdiction. It is a question of the jurisdiction of the Circuit Court to grant the writ of *habeas corpus*, and to liberate these men, and that question, as I shall show you by and by, brings up all the other questions in the cause.

The fourth objection to the jurisdiction of this Court is that the case must be one in which the answer to the questions when given shall be *final*; that is to say, the questions come here to be finally decided. What does that mean? Does it mean that the same thing can never be debated again? Certainly not. It means that the decision shall be final for the two judges who certified the difference of opinion, so that when the answer goes down from this Court they shall act according to its order, as if they had originally decided in the same way. That is all it means.

Mr. Justice NELSON: Final upon the point?

Mr. FIELD: Yes, sir; final upon the point. Why, says the learned gentleman, would it not be a monstrous hardship if we were to have an argument here by *amici curiæ* (and he thus calls himself and his associates), which should conclude the Government in any future controversy. I answer, the Court will deal with this decision as they would deal with any other under like circumstances. It will not be *res adjudicata* in the technical sense, except in respect to parties before the Court; and, if any new party comes in, his rights will not stand prejudged.

Mr. STANBERRY: Will you allow me, Mr. Field, to ask you a question?

Mr. FIELD: Certainly.

Mr. STANBERRY: If the question certified here, whether the military commission had jurisdiction to try these men, be answered in the affirmative or in the negative, do you mean to say that, when they are brought in afterward on the writ and a return is made, they are concluded or not?

Mr. FIELD: I mean to say that the Court will deal with the case just as the Courts dealt with Passmore Williamson's case, and the case in Burrows, the case in Barnewall and Alderson, and the other cases mentioned. The determination will be as final as any determination on granting a *habeas corpus* can be. When a *habeas corpus* is applied for, the Courts do consider in the first instance whether it appears, upon the facts stated, that, upon the coming in of the return, the prisoner would be remanded. If the learned counsel's reasoning is good, it would prevent a Judge from considering the legality of the imprisonment on the application for the writ, because that question ought to be kept open till the party is brought in and the return is made. It is, however, as well settled as anything can be settled, not only in the State Courts, and in the Courts of England, but in this Court, that when an application is made for a *habeas corpus*, unless the Court see that there is color of right for the prisoner to be discharged, they will not grant the writ, and therefore they will go into an examination of that question, more or less complete. Whether that shall be so far conclusive as that there shall never be any more debate on the subject in the progress of the cause, is a question which I need not now consider.

Mr. BLACK: They are not concluded upon any question that may be raised by the return.

Mr. FIELD: They are not concluded upon any question, raised by the return, which has not been debated, or in respect to which they are not parties. Whether in this case, after the arguments of my learned friends, after the efforts of the Government to have the cause thoroughly defended, the question would be reopened, and reargued, depends upon the Judges, and rests in their breasts.

All the effect to be given to the decision here is, that the answer is to stand as the judgment of the Circuit Court, and

is final there. But the case is always open to be changed by any new state of facts; just as questions certified upon a demurrer or a plea to the jurisdiction may be affected by new facts, and the decision once given may fail of ending the cause.

The fifth objection to the jurisdiction of this Court is, that the *whole case* is certified. I answer, that no question is certified, except those which actually arose before the Court at the time, and without considering which it could not move at all. That is my first answer. The second is, that if too much is certified the Court will divide the questions, and answer only those which it finds to be properly certified, as it did in the *Albany Bridge case*.<sup>\*</sup> There were several questions in that case, some of which you held ought not to have been certified, and you answered only those that were properly here. If, therefore, you do not choose to look into the question of military commissions—though I suppose you will do so for reasons which I have in part given, and of which I shall give more by and by—if you merely look at the question of issuing the *habeas corpus*, or of granting the order for discharge, the other question may remain open for future debate. I will only stop to observe that my learned friend can, with poor grace, take an objection of this sort here, since he himself argued that the application for the writ necessarily brought up the question of the jurisdiction of the military tribunal; and my learned friends, the Attorney-General and his associate, General Butler, in their printed brief, have put themselves upon that point distinctly. This is their language, as I read it from their brief before me :

“It is assumed to be the well-settled practice of the Courts of the United States, upon application for a writ of *habeas corpus*, that if it appear upon the facts stated by the petitioner, all of which shall be taken to be true, that he could not be discharged upon a return of the writ, then no writ will be issued. Therefore the questions resolve themselves into two, which, for convenience of argument, may be reversed thus :

“1. Has the military commission jurisdiction to hear and determine the case submitted to it ?”

Before I leave this point let me refer you to a text-book which contains a great number of authorities, Hurd on *habeas corpus*, page 222 (where there is a list of cases, too long for

<sup>\*</sup> 1 Black, 588.

me to mention), further to show that it is the well-settled law of every State in this Union, as well as of the United States, that, upon an application for a writ of *habeas corpus*, the Court will at least look into and decide to a certain extent the question of the regularity or legality of the commitment from which the party seeks to be relieved.

The last objection of my learned friend to the jurisdiction of this Court is, that the case is ended; yes, *ended*, because, says he, it is to be presumed that these poor, unfortunate men have been hanged. Is it to be presumed that any executive officer of this country, though he arrogate to himself this awful power of military government, would venture to put to death three men, who claim that they are unjustly convicted, and whose case is considered of such gravity by the Circuit Court of the United States that it certifies the question to the Supreme Court?

The suggestion is disrespectful to the Executive, and I am glad to believe that it has no foundation in fact.

I have thus gone through with the preliminary objections to the hearing and decision of these cases, and I submit that I have answered all the objections. There is nothing, then, in the way of my proceeding to the merits, and entering upon the MAIN ARGUMENT.

The petitioners are natives of the United States, and have been many years citizens of Indiana. Though not "in the land or naval forces of the United States," or connected in any way with the public service, they were arrested in September and October, 1864, at their homes in Indiana, by order of General Hovey, commanding the military district of Indiana, taken to Indianapolis, and there, in October following, tried by a military commission and sentenced to be hung. The sentences were commuted to imprisonment for life, and they are now in the penitentiary undergoing this imprisonment. The charges upon which they were tried were five, viz.:

1. "Conspiracy against the Government of the United States."
2. "Affording aid and comfort to rebels against the authority of the United States."
3. "Inciting insurrection."
4. "Disloyal practices"; and
5. "Violation of the laws of war."

Under the first charge there were four specifications; under the second, three; under the third, two; under the fourth, five; and under the fifth, two. The substance of these various specifications was, joining and aiding, at different times between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, "for the purpose of overthrowing the Government and duly constituted authorities of the United States . . . at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, Indiana" [or "at or near Shoals's Station, Martin County, Indiana," or "at or near Green York Township, Randolph County, Indiana," or "at or near Salem, Washington County, Indiana"], "a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy," or "at or near the city of Chicago, Illinois, a State within the lines of the army of the United States, and the theatre of military operations, and threatened by invasion of the enemy." These were amplified and stated with various circumstances, thus:

IN THE FIRST SPECIFICATION OF THE FIRST CHARGE: "Conspiring against the duly constituted authorities of the United States."

SECOND SPECIFICATION OF THE FIRST CHARGE: Combination with certain persons to "adopt and impart to others the ritual of the society"; "denying the authority of the United States to coerce to submission certain rebellious citizens of the United States."

THIRD SPECIFICATION OF THE FIRST CHARGE: The society's intent and purpose "to cripple and render powerless the efforts of the Government of the United States in suppressing a then existing formidable rebellion against the said Government"; and in the

FOURTH SPECIFICATION OF THE FIRST CHARGE: Conspiracy "to seize by force the United States and State Arsenals at Indianapolis, Indiana; Columbus, Ohio; and Springfield, Illinois; to release by force the rebel prisoners held by authority of the United States," . . . "arm those prisoners with the arms thus seized, and that these said conspirators, with all the forces they were able to raise in the secret order above named, were in conjunction with the rebel prisoners thus released and armed to march into Kentucky and Missouri, and coöperate with the rebel forces to be sent to those States by the rebel authorities, against the Government and authorities of the United States."

IN THE FIRST SPECIFICATION OF THE SECOND CHARGE: "Communicating with the enemies of the United States, with intent that they should

... invade the States of Kentucky, Indiana, and Illinois, with the further intent, that the order aforesaid should . . . coöperate with the said armed forces of the rebellion . . . and communicating" to them that intent.

**SECOND SPECIFICATION OF THE SECOND CHARGE:** Sending a member of the said order "with instructions for . . . other members . . . to select good couriers or runners . . . for the purpose of assisting those in rebellion against the United States, to call to arms the members of the order and other sympathizers with the existing rebellion, whenever a signal should be given by the order."

**THIRD SPECIFICATION OF THE SECOND CHARGE:** "Joining themselves in an unlawful secret society, . . . designed for the overthrow of the Government of the United States, and to compel terms with the . . . Confederate States . . . and communicating the designs of that society to those in rebellion."

In the **FIRST SPECIFICATION OF THE THIRD CHARGE:** "Organizing, and attempting to arm, and arming a portion of the citizens of the United States, through an unlawful secret society, known as the Order of American Knights . . . with intent to induce them, with themselves, to throw off the authority of the United States, and to coöperate with their armed enemies."

In the **SECOND SPECIFICATION OF THE THIRD CHARGE:** "By public addresses, etc., arousing sentiments of hostility to the Government of the United States, and attempting to induce the people to revolt . . . and secretly arm and organize themselves to resist the laws of the United States."

In the **FIRST, SECOND, THIRD, and FOURTH SPECIFICATIONS OF THE FOURTH CHARGE:** "Advising citizens to resist a draft . . . and arming citizens of the United States, belonging to the Order of American Knights, for the purpose of resisting the draft" . . . (fol. 25) at four different places named.

In the **FIFTH SPECIFICATION OF THE FOURTH CHARGE:** "Accepting and holding offices in the military forces for the State of Indiana, in an unlawful society, known as the Order of American Knights, . . . being offices and forces unknown to the Constitution and laws of the United States, and of Indiana . . . and in opposition to the legally constituted authorities thereof."

In the **FIRST SPECIFICATION OF THE FIFTH CHARGE:** "Violating their allegiance . . . and attempting to introduce enemies of the United States into the loyal States, thereby to overthrow and destroy the authority of the United States."

**SECOND SPECIFICATION OF THE FIFTH CHARGE:** "Organizing and extending an unlawful secret society . . . having for its purpose the same general object and design as the enemies of the United States, and with the intent to aid and insure the success of said enemies, in their resistance to the authorities of the United States."



I will not here stop to call attention to the great misapplication of language in connecting the last charge with the two specifications under it. It is called a "violation of the laws of war," for a citizen to violate his allegiance, and to attempt the introduction into the country of its enemies. It is also called a "violation of the laws of war," for a citizen to organize a secret society, "having for its purpose the same general object and design as the said enemies of the United States, and with the intent to aid and insure the success of the said enemies in their resistance." Nor will I stop to remark upon the strange medley of acts and opinions contained in the other specifications. Thus, for example, the second specification of the first charge accuses the petitioners of a combination to adopt and impart the creed of a secret society, "denying the authority of the United States to coerce to submission certain rebellious citizens of the said United States"; and the first four specifications of the fourth charge accuse them of advising citizens to resist the draft, and of attempting to arm, and arming certain citizens, "for the purpose and with the intent of resisting said call or draft"; and the fifth specification of the same charge accuses them of holding offices of the military forces of this secret society, which "are unknown to the Constitution and laws of the United States, or of the State of Indiana, and are not in aid of, but opposed to, the legally constituted authorities thereof." These are but specimens of what we may expect from the prevalence of military commissions.

While the petitioners were in prison, and nine days before the time appointed for their execution, each of them presented a petition to the Circuit Court of the United States for the District of Indiana, setting forth the foregoing facts, with a copy of the charges, specifications, finding, and sentence, and praying that, under the "Act of Congress, approved March 3, 1863," entitled "An Act relating to Habeas Corpus, and regulating judicial proceedings in certain cases," "he may [might] be brought before this Court, by writ of *habeas corpus*, or such other writ or order as the Court [might] award for that purpose, together with the cause of his caption and detention, to do and receive whatever the Court [might], upon full and final hearing, order and adjudge in relation thereto, in pur-

suance of the Act of Congress aforesaid, and that at all events he [might] be delivered from said military custody and imprisonment, and if found probably guilty of any improper conduct or offense against the United States of America, turned over to the proper civil tribunals for inquiry and punishment according to law, or for discharge from custody altogether."

Upon this application the Judges were divided in opinion, and they sent to this Court a certificate of their division, upon the following three questions:

1. "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued, according to the prayer of said petition?"

2. "On the facts stated in said petition and exhibits, ought the said [Lamdin P. Milligan] to be discharged from custody, as in said petition prayed?"

3. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction to try and sentence said [Milligan] in manner and form as in said petition and exhibits is stated?"

The argument upon these questions naturally divides itself into two parts:

*First.* Was the military commission a competent tribunal for the trial of the petitioners upon the charges upon which they were convicted and sentenced?

*Second.* If it was not a competent tribunal, could the petitioners be released by the Circuit Court of the United States for the District of Indiana, upon writs of *habeas corpus* or otherwise?

The discussion of the competency of the military commission is first in order, because, if the petitioners were lawfully tried and convicted, it is useless to inquire how they could be released from an unlawful imprisonment.

If, on the other hand, the tribunal was incompetent, and the conviction and sentence nullities, then the means of relief become subjects of inquiry, and involve the following considerations:

1. Does the power of suspending the privilege of the writ of *habeas corpus* appertain to all the great departments of Government concurrently, or to some only, and which of them?

2. If the power is concurrent, can its exercise by the executive or judicial department be restrained or regulated by Act of Congress?

3. If the power appertains to Congress alone, or if Congress may control its exercise by the other departments, has that body so exercised its functions as to leave to the petitioners the privilege of the writ, or to entitle them to their discharge?

In considering the first question—that of the competency of the military tribunal for the trial of the petitioners, upon those charges—let me first call attention to the *dates* of the transactions. The commission was created by general order, dated the 17th of September, 1864, directing a military commission to convene at Indianapolis, for the trial of Harrison H. Dodd, and such other persons as might be brought before it. The arrest of Bowles was made on the 18th of September; of Miligan, on the 5th of October; and of Horsey, on the 14th of October. The petitioners were brought before the commission on the 21st of October; the trial lasted until January 1, 1865. On the first Tuesday of November, 1864, the Circuit Court of the United States convened at Indianapolis; it continued by adjournment to the 2d of January, 1865, remained in session till the 27th of January, and then adjourned for the term. The Circuit Court for the Southern District of Illinois sat at Springfield in June, 1864, and January, 1865, and for the Northern District, at Chicago, on the first Monday of July and the third Monday of December, 1864. The record of this military trial slept in the War Department from January to the 2d day of May, 1865, on which day it for the first time appeared, as an authentic document, containing an approval of the finding and sentence, and an order for the execution. On the 10th of the month the petitioners made their application to the Circuit Court.

Bearing in mind that the promulgation of the proceedings by the War Department was on the 2d of May, 1865, let me refer to certain facts of public notoriety, of which the Court will take judicial notice.\* On the 3d of April, 1865, the

\* See 13 Peters, 590. *Bk. of Augusta vs. Earle*, 2 Rob. Lou., 468; 3 Mart. Lou., 546; 1 Greenl. Ev., 4, 5, 6.

power of the rebel Confederacy was crushed to atoms, when the rebels fled from Richmond. On the 9th of April, Lee surrendered. The chief of the rebel government was a fugitive, closely pursued by horsemen, till he was finally captured on the 11th of May. Mobile was taken on the 13th of April; Johnston surrendered on the 25th of April; and Taylor gave up the last rebel force east of the Mississippi on the 4th of May.

On the morning of the day when these men were to have been hanged at Indianapolis, upon the plea of military necessity, there was not an arm raised against the Government between the Atlantic and the Father of Rivers; all was submission, from the Rio Grande to Katahdin. Three days later—that is, on the 22d of May—the victorious armies, returning from their fields of glory, passed, for the last time, in review before the President, when you saw nearly two hundred thousand veterans defiling through the avenues of the capital, with triumphant music and banners, and, to repeat the description of an eminent statesman of Ohio, now deceased, sweeping along as if they were lords of the world.

There had not been a hostile foot in the State of Illinois, from the beginning of the war, if I am correctly informed, and in Indiana never but once, if we except guerrillas crossing the Ohio and returning within a few hours, and that once was on the occasion of Morgan's raid in July, 1863. This raid was a total failure; its leader was captured, his band dispersed, and he himself sent to the penitentiary. Managing to escape, he attempted again to get up a raid into Kentucky, but was defeated and killed on the 12th of April, 1864.

On the 21st of October, 1864, when this military trial began, there was not only no enemy in arms within the States of Indiana and Illinois, but none within hundreds of miles. Price was retreating from Missouri, and was overtaken and utterly routed on the 22d of October. The valley of the Shenandoah was finally cleared of the rebels by the decisive victory of Sheridan on the 19th of October. Sherman had been seven weeks at Atlanta preparing for his grand march to the sea. Grant had pinned Lee's army to Richmond, where he finally ground it to powder.

Let it be observed next that, for the same offenses as those

set forth in these charges and specifications, the petitioners could have been tried and punished by the ordinary civil tribunals. For "conspiring against the Government of the United States"; for "affording aid and comfort to rebels against the authority of the United States"; for "inciting insurrection"; for the "disloyal practices" set forth in the five specifications under that charge, and for the "violation of the laws of war," set forth in the two specifications under the fifth charge, penalties considered sufficient by the law-making power had been already declared, and ample provision had been made for indictment and trial in the ordinary courts.

Treason, as everybody knows, is defined by the Constitution, and its punishment is prescribed by Act of Congress. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." "The Congress shall have power to declare the punishment of treason." By the Act of April 30, 1790, Congress declared the punishment of treason to be death.

By the Act of July 31, 1861 (12 *U. S. Stat.*, 284), it is declared that—

§ 1. "If two or more persons within any State or Territory of the United States shall conspire together, to overthrow or to put down, or to destroy by force, the Government of the United States; or to levy war against the United States; or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder or delay the execution of any law of the United States; or by force, to seize, take or possess any property of the United States, against the will, or contrary to the authority of the United States; or by force, intimidation, or threat, to prevent any person from holding any office, or trust, or place of confidence under the United States; each and every person, so offending, shall be guilty of a high crime, and upon conviction thereof, in any District or Circuit Court of the United States, having jurisdiction thereof, or District or Supreme Court of any Territory of the United States, having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars, and not more than five thousand dollars; or by imprisonment, with or without hard labor, as the Court shall determine, for a period not less than six months, nor greater than six years, or by both such fine and imprisonment."

By the Act of August 6, 1861 (*U. S. Stat.*, 317)—

§ 1. "If any person shall be guilty of the act of recruiting soldiers or sailors in any State or Territory of the United States to engage in armed hostility against the United States, or who shall open a recruiting station

for the enlistment of such persons, either as regulars or volunteers, to serve as aforesaid, shall be guilty of a high misdemeanor, and, upon conviction in any court of record having jurisdiction of the offense, shall be fined a sum not less than two hundred dollars nor more than one thousand dollars, and confined and imprisoned for a period not less than one year, nor more than five years.

§ 2. "The person so enlisted, or engaged as a regular or volunteer, shall be fined in a like manner a sum of one hundred dollars, and imprisoned not less than one nor more than three years."

By the Act of July 19, 1862 (12 *U. S. Stat.*, 590)—

§ 2. "If any person shall incite or set on foot, assist or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the Court."

By the Act of February 25, 1863 (12 *U. S. Stat.*, 696)—

§ 1. "If any person, being a resident of the United States, or being a citizen thereof, and residing in any foreign country, shall, without the permission or authority of the Government of the United States, and with the intent to defeat the measures of the said Government, or to weaken in any way their efficacy, hold or commence, directly or indirectly, any correspondence or intercourse, written or verbal, with the present pretended rebel government, or with any officer or agent thereof, or with any other individual acting or sympathizing therewith; or if any such person above mentioned, not duly authorized, shall counsel or assist in any such correspondence or intercourse, with intent as aforesaid, he shall be deemed guilty of a high misdemeanor, and, on conviction before any Court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not less than six months, nor exceeding five years."

And by the Act of March 3, 1863 (12 *U. S. Stat.*, 731)—

§ 25. "That if any person shall resist any draft, of men enrolled under this act, into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service relating thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted men not to appear at the place of rendezvous, or willfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the Provost Mar-

shall, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

There has, indeed, been no lack of legislation in respect to any matter connected with the rebellion. The title on "Insurrection," in Brightly's Supplementary Digest, fills a dozen closely printed pages.

Let it also be remembered, that Indiana, at the time of this trial, was a peaceful State; the Courts were all open; their processes had not been interrupted; the laws had their full sway. How do we know that? We know it, first, from the most authentic acts of the Government. Indiana participated in the Presidential election of 1864, and gave her full vote. She has been all the time fully represented in both Houses of Congress. That body, in 1862, passed an act declaring, that when, in any State or Territory, or in any portion thereof, by reason of insurrection or rebellion, the civil authority of the Government of the United States was obstructed, so that the act to provide increased revenue could not be peaceably executed, the taxes should be charged upon the real estate therein; and providing, by the second section of the act (12 *U. S. Stat.*, 422), "that before the first day of July next the President, by his proclamation, [should] declare in what States and parts of States said insurrection" existed.

The President, in pursuance of this Act of Congress, issued a proclamation, dated July 1, 1862, reciting that, by the act which I have just quoted, it was made his duty to declare, on or before the first day of July, by his proclamation, in what State or parts of States insurrection existed; and proceeding to declare:

"I, Abraham Lincoln," . . . "hereby declare and proclaim that the States of South Carolina, Florida, Georgia, Alabama, Louisiana, Texas, Mississippi, Arkansas, Tennessee, North Carolina, and the State of Virginia, except the following counties," . . . "are now in insurrection and rebellion, and by reason thereof the civil authority of the United States is obstructed," etc.

Indiana and Illinois were therefore not considered by the President to be in a state of insurrection. The executive de-

partment of the Government declared, in effect, that in every part of those States the taxes could be peaceably collected.

But we know from other sources that Indiana and Illinois were at peace. Appeals have been regularly brought hither from the Courts of those States. You, Mr. Justice Davis, and your associates in those districts, know, from the records of your own Courts, whether or not cases have been regularly tried, and the laws have had their course in Indiana and Illinois; and of that you are, for good reasons, the best judges. Long ago, the law provided for the solution of just such a question. In the third book of his *Institutes*, section 412, in the chapter on descents, Coke states it thus :

"First, it is necessarie to be known, what shall be said time of peace, *tempus pacis*; and what shall be said, *tempus belli sive guerra*, time of war. *Tempus pacis est quando cancellaria, et alia curia regis sunt aperta, quibus lra fidebat cuiuscunque prout fieri consuevit.* And so it was adjudged in the case of Roger Mortimer, and Thomas Earle of Lancaster. *Utrum terra sit guerrina necne, naturaliter debet judicari per recorda regis, et eorum, qui curias regis per legem terras custodiunt, et gubernant, sed non alio modo.*"

By the records of the Courts, and in no other manner!

Those records are the evidence whether your Courts were open.

The charges and specifications do not even suggest that the regular course of justice had been once impeded. All that they pretend is, that the acts were done "at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, Indiana [or Chicago, Illinois], a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy." This allegation is a gross perversion of the facts. To be within military lines is to be within the lines of sentinels which mark the boundary of military occupation, and within which the discipline of the camp, under the control of the Provost Marshal, alone prevails. The Judges to whom this petition was addressed know that this was not true then, and had never been true of the State of Indiana, or of the State of Illinois.

How is it that an officer of the Government, one who, pre-



sumably at least, can have no interest to oppress the citizen, should dare to put upon a public record, for the purpose of bringing men to death, an allegation like that! You know, we all know, because you know and we know the public history of the country, that during all this war the civil governments of Indiana and Illinois have been uninterrupted. Industry has followed its accustomed channels; the fields have been plowed; the harvests have been gathered, the people have been prosperous, throughout these two vigorous States of the West, which repose in conscious greatness between the great rivers and the lakes.

Chicago, a place within the military lines! That city, the queen city of the North, looking like another Venice upon the waters of the Michigan, with her harbor crowded with ships, and the lake before her white with sails; that city, to which long lines of heavily laden cars were daily and hourly bringing the products of all the West, whose granaries were the storehouses for the world; that city had never known war!

Then let it be remembered that the petitioners were simple citizens not belonging to the army or navy; not in any official position; not connected in any manner with the public service. They were in the condition of any other citizen who might fall under suspicion; any judge, lawyer, physician, or clergyman of the State of Indiana. The assumption of the right to try them upon these charges was the assumption of the right to try other citizens of Indiana, whoever they might be, upon the same charges. The evidence against the petitioners is not to be found in this record, and it is immaterial. Their guilt or their innocence does not affect the question of the competency of the tribunal by which they were judged. What they dispute, and what I dispute, is the jurisdiction of the military commission to decide the issue of guilt or innocence. They may, for aught I know, have been as guilty as fiends or as pure as angels. If they were in heart disloyal to their country, I abhor and despise them; if they have been guilty of any act of treason, let them be tried for it before the judges of the land; if they have conspired against the safety or the honor of the nation, there is the Act of Congress for their punishment; and, if, by reason of any defect in the law of evidence, or of juries,

they are likely to escape conviction before the civil tribunals, here are the two Houses of Congress sitting in the wings of this Capitol, who can amend the laws. I am not seeking to screen the guilty, but I contend for the right of every man to be judged according to the laws, for thereby only can it be certainly known who is guilty or who is innocent. I am struggling, not for the escape of guilt, but for the safeguard of innocence.

Bearing in mind, therefore, the nature of the charges, and the time of the trial and sentence; bearing in mind also the presence and undisputed authority of the civil tribunals and the civil condition of the petitioners, I ask by what authority they were withdrawn from their natural judges, by what authority another kind of tribunal was constituted? By what authority does it purport, on the face of the proceedings, to have been constituted? It was established by special order of General Hovey, of the United States Volunteers, who was at that time in command of the military district of Indiana; which order named one brigadier-general and six colonels to hold a military commission at Indianapolis. The commission was subsequently enlarged by the addition of four colonels and one lieutenant-colonel. What was the general jurisdiction of this commission? Whom it was to try, and for what offenses, does not appear further than that it was to try "Harrison H. Dodd and such other prisoners as might be brought before it." The only special direction was this: "The commission will sit without regard to hours."

It was called a military commission. What is a military commission? Is it a body known to the laws? Is it a court-martial under another name, or what is the difference between them? Originally, a military commission appears to have been nothing more than an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer in cases where he might act for himself if he chose. Its constitution and functions were not defined by law, because strictly it had no legal existence any more than a council of war. General Scott resorted to it in Mexico for his assistance in governing conquered places. The first mention of it in an Act of Congress appears to have been in the Act of

July 22, 1861, where the general commanding a separate department, or a detached army, was authorized to appoint a military board, or commission, of not less than three nor more than five officers to examine the qualifications and conduct of commissioned officers of volunteers.

Subsequently, military commissions are mentioned in four Acts of Congress, but in none of them is any provision made for their organization, regulation, or jurisdiction, further than that it is declared that in time of war or rebellion spies may be tried by a general court-martial or military commission; and that "persons who are in the military service of the United States, and subject to the articles of war," may also be tried by the same for murder and certain other infamous crimes.

These acts do not confer upon military commissions jurisdiction over any persons other than those in the military service and spies. Is there any other Act of Congress which confers it? None is pretended, unless it is inferred from the Act of March 3, 1863. This act, it has been sometimes said, though not now much insisted on, gives the sanction of Congress to the President's proclamation of September 24, 1862. That proclamation ordered, that "during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, *their aiders and abettors*, within the United States, and *all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels* against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission." The fourth section of the Act of Congress declared, "that any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense, in all Courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea or under the general issue."

Assuming this section to be constitutional, though I suppose it is clearly unconstitutional, it goes only to the length of

making the President's order a *defense* to an action or prosecution, civil or criminal, for a *search, seizure, arrest, or imprisonment*. It gives no other validity or vitality to any Presidential order. Suppose, for example, General Hovey had executed the petitioners and been therefor indicted for murder, under the laws of Indiana, the President's order and this Act of Congress would not have sufficed for his defense. Or suppose there had been a writ of prohibition sued out from the Supreme Court of Indiana to restrain the military commission from acting, the President's order and the Act of Congress would not have been of themselves a sufficient answer to the writ.

There being, then, no Act of Congress for the establishment of the commission, it depended entirely upon the Executive will for its creation and support. This brings up the true question now before the Court. Has the President, in time of war, by his own mere will and judgment of the exigency, the power to bring before his military officers any man or woman in the land, to be there subject to trial and punishment, even to death? The proposition is stated in this form, because it really amounts to this; for even though these military officers were infallible, and would never misjudge or mistake the innocent for the guilty, yet their power to try is their power to judge all; which means that all, without distinction, may, upon charge of *disloyal practices*, be brought before them, for trial and sentence.

If the President has this awful power, whence does he derive it? From the Constitution? He can exercise no authority whatever but that which the Constitution of the country gives him. Beyond it he has no more power than any other citizen. Our system knows no authority beyond or above the law. We may, therefore, once for all, dismiss from our minds every thought of the President's having any prerogative as representative of the people, or as interpreter of the popular will. He is elected by the people to perform those functions, and those only, which the Constitution of his country, and the laws made pursuant to that Constitution, confer.

The plan of argument which I propose to myself is, first, to examine the text of the Constitution. That instrument,

framed with the greatest deliberation, after thirteen years' experience of war and peace, should be accepted as the authentic and final expression of the public judgment regarding that form and scope of government, and those guarantees of private rights, which legal science, political philosophy, and the experience of previous times had taught as the safest and most perfect. All attempts to explain it away, or to evade or pervert it, should be discountenanced and resisted. Beyond the line of such an argument everything else ought, in strictness, to be superfluous. But, as our previous discussion has taken a wider range, I shall endeavor to show, further, that the theory of our Government, for which I am contending, is the only one compatible with civil liberty; and, lastly, by what I may call an historical argument, that this theory has the concurring testimony of the judges, lawyers, and statesmen of this country down to the time of the rebellion; and that, even in the constitutional monarchies of England and France, that theory of executive power, which would uphold military commissions, like the one against which I am speaking, has never been admitted.

What are the powers and attributes of the Presidential office? They are written in the second article of the Constitution, and, so far as they relate to the present question, they are these: He is vested with the "executive power"; he is "commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States"; he is to "take care that the laws be faithfully executed"; and he takes this oath: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." Here are all the words from which the power to try civilians before military commissions can be derived, if it exist at all. Is it possible to derive it from any of them? The "executive power" mentioned in the Constitution is the executive power of the United States. The President is not clothed with the executive power of the States. He is not clothed with any executive power, except as he is superficially directed by some other part of the Constitution, or by an Act

of Congress ; in other words, the expression, "executive power," standing by itself, and without a specification of what he is to execute, would not enable him to execute at all. The same expression is used in the State Constitutions, and with the same result. For example, the Constitution of New York declares that "the executive power shall be vested in a Governor," and that he "shall take care that the laws are faithfully executed," while, in truth, he executes very little. The State officers, as they are called, corresponding with those which make the Cabinet of the President, are chosen by the people, and are quite independent of the Governor. There is no portion of the Constitution of the United States which prescribes what the President shall do, in the exercise of his "executive power," and which affects the present question, except those which I have quoted.

We must recur, then, to the other parts of the Constitution which have been mentioned. The President is to "take care that the laws be faithfully executed." He is to execute the laws, by the means, and in the manner, which the laws themselves prescribe. For example, an Act of Congress authorizing him, by the machinery of custom-houses, to collect the revenues, would not empower him to stop ships at sea, and there exact the customs. An Act of Congress authorizing him to get up a navy, by building ships and enlisting seamen, would not authorize the impressment of seamen. The laws provide not only what is to be done, but the manner of doing it ; and all these the President is to execute.

The oath of office can not be considered as a grant of power. Its effect is merely to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience against any attempt to usurp power or overthrow the Constitution.

There remains, then, but a single clause to discuss, and that is the one which makes him the commander-in-chief of the army and navy of the United States, and of the militia of the States when called into the Federal service. The question, therefore, is narrowed down to this : Does the authority to command an army carry with it authority to arrest and try, by court-martial, civilians ? by which I mean persons not in the

martial forces—not impressed by law with a martial character. The question is easily answered. To command an army, whether in camp, or on the march, or in battle, requires the control of no other persons than the officers, soldiers, and camp-followers. It can hardly be contended that, if Congress neglects to find subsistence, the commander-in-chief may lawfully take it from our own citizens. It can not be supposed that, if Congress fails to provide the means of recruiting, the commander-in-chief may lawfully force the citizens into the ranks. What is called the war power of the President, if, indeed, there be any such thing, is nothing more than the power of commanding the armies and fleets which Congress causes to be raised. To command them is to direct their operations.

Much confusion of ideas has been produced by mistaking *executive* power for *kingly* power. Because, in monarchical countries, the kingly office includes the executive, it seems to have been sometimes inferred that, conversely, the executive carries with it the kingly prerogative. Our Executive is in no sense a king, not even for four years. The difference between his office and that of the most constitutional king on earth does not consist in the one being hereditary and the other elective, or in one being responsible and the other irresponsible, or in the one being for life and the other for four years, but in the essential attributes of the two offices.

Thus far I have reasoned upon that article of the Constitution (the second) which creates and regulates the executive power. If we turn to the other portions of the original instrument (I do not now speak of the amendments) the conclusion already drawn from the second article will be confirmed, if there be room for confirmation. Thus, in the first article, Congress is authorized “to declare war, and make rules concerning captures on land and water”; “to raise and support armies”; “to provide and maintain a navy”; “to make rules for the government and regulation of the land and naval forces”; “to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions”; “to provide for organizing, arming, and disciplining the militia, and governing such part of them as may be in the service of the United States, reserving to the States respectively

the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress"; "to exercise exclusive legislation in all cases whatsoever over . . . . all places purchased . . . . for the erection of forts, magazines, arsenals, dockyards"; "to make all laws which shall be necessary and proper for carrying into execution the . . . . powers vested by this Constitution in the Government of the United States, or in any department or office thereof."

These various provisions of the first article would show, if there were any doubt upon the construction of the second, that the powers of the President do not include the power to *raise* or *support* an army; or to *provide* or *maintain* a navy; or to *call forth the militia*, to repel an invasion, or to suppress an insurrection, or *execute the laws*; or even to *govern* such portions of the militia as are called into the service of the United States; or to make laws for any of the forts, magazines, arsenals, or dockyards. If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of Indiana to repel an invasion of that State, or, when called, govern them, it is absurd to say that he could, nevertheless, under the same circumstances, govern the whole State and every person in it by martial rule.

The jealousy of the executive power prevailed with our forefathers. They carried it so far that, in providing for the protection of a State against domestic violence, they required, as a condition, that the *Legislature* of the State should ask for it, if it could be convened.\*

I submit, therefore, that upon the text of the original Constitution, as it stood when it was ratified, there is no color for the assumption that the President, by his mere will, without Act of Congress, could create military commissions for the trial of persons not military for any cause or under any circumstances whatever. But as we well know, the Constitution, in the process of ratification, had to undergo the severest ordeal which any instrument ever yet underwent from discussion and criticism alone, before actual experiment. Objections were started by jealousy and by fear; dangers were supposed; evil consequences predicted, and great apprehension and alarm created.

\* Const., Art. IV, sect. 4.



To quiet these apprehensions, as well as to guard against any possible dangers, ten amendments were proposed by the first Congress sitting at New York, in 1789, and were duly ratified by the States. The third and fifth of these amendments are as follows:

"ART. III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

"ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

If there could have been any doubt whatever, whether military commissions or courts-martial for the trial of persons not "in the land or naval forces, or the militia" in actual service, could ever be established by the President, or even by Congress, these amendments would have removed the doubt. They were made for a state of war as well as a state of peace; they were aimed at the military authority, as well as the civil; and they were as explicit as our mother-tongue, the language of freemen, could make them. "No soldier shall . . . be quartered in any house . . . in time of war, but in a manner to be prescribed by law." "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger.*" The phrase "in time of war or public danger" qualifies the member of the sentence relating to the militia; as, otherwise, there could be no court-martial in the army or navy during peace. Here is a clear, unequivocal command of all the people, in contemplation of a state of war, no less than a state of peace, and stamped, as with types of iron, into their organic law, that at no time shall any person whatever be subject to military trial, *except in these specified cases.*

These amendments were proposed, as I have already stated, in the first Congress held under the Constitution; they were brought in by Mr. Madison, and their history, the form in which they were introduced, and the changes which they underwent, are most instructive. His proposition in this respect was in the following words :

"The trial of all crimes (except in cases of impeachment and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites; and [in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an indispensable preliminary; provided, that in cases of crimes committed within any county which may be in] possession of the enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offense.

"In cases of crimes not committed within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolable."

This was referred to a committee of eleven, which struck out the part in brackets and substituted therefor the following :

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the," etc.

The whole proviso was struck out in the Committee of the Whole, and finally the proposition was reduced between the two Houses to the form in which it now stands.

This completes my argument upon the text of the Constitution. The language of that instrument should set the matter at rest for ever. There is no room left for interpretation. The words are direct and plain. It would be difficult to make them plainer or more direct. If one should set himself to the task of expressing most clearly the intention to limit and restrain military jurisdiction, he would find it hard to choose a better form of words. If he were to exclude military commissions by name, that would perhaps leave the door open to the same thing, in another form. The language used is general and comprehensive. "*No person* shall be held to answer for a

capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," etc. This solemn declaration of the whole people, set in their great organic charter, ought for ever to command obedience and preclude debate.

Respect for the Constitution and absolute conformity to all that it enjoins are indispensable to the preservation of our freedom. Respect for the Constitution is but one form of respect for law. The Constitution is the highest of all human laws. The respect of which I speak is not regard for a mere instrument, nor a blind devotion to forms, but a sentiment and a conviction founded in nature and justified by political philosophy and the profoundest policy. Loyalty with us is not of that lower form which attaches itself to an individual or a family, but of that which is higher, and attaches itself to the State and the nation; when these speak, they speak through the laws, and he who treats them with disregard is disloyal to his sovereign.

Pardon me for referring to these truisms. We have fallen upon evil times; we have fallen upon times when there is less respect than there used to be for the Constitution and the laws. We know that the mention of the Constitution almost provokes a sneer or a smile in some parts of the country, and in some political bodies. Our forefathers thought and felt differently. Washington, in his Farewell Address, gave us this advice:

"This Government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty." In our abundant prosperity, in the peace and order with which affairs have proceeded in this country up to the period of the rebellion, we have appeared almost to forget the fundamental maxims of liberty. It is good for us to recur to them. As expressed in the original Constitution of Massachusetts, "a frequent recurrence to the principles of the Constitution is one of the things absolutely necessary to preserve the

advantages of liberty, and to maintain a free government." It is the great problem of the time, whether we can govern ourselves so far as to adhere inflexibly to the written Constitution we have ourselves prescribed. Union we are certain of. The Almighty has impressed upon this continent the features which will always make us a people one and indivisible. The great central valley of the Mississippi will lay its hands upon the Atlantic and Pacific slopes, and keep them together as with clamps of iron. The problem is, how we shall be governed; what rights we shall possess. A consolidated government can not exist on this continent, unless it be monarchical. To maintain a government under which we can be free, we must preserve the Union and the States, each and all in the plenitude of their rightful powers; indestructible parts and elements of the system. *E Pluribus Unum* must be the motto on our hearts, as on our escutcheon; one Union and many States, each essential to all the rest.

A pure democracy, that is to say, a government in which all the people in their primary assemblies make the laws, is possible only in small towns. Representative government can be preserved only through the restraint of a written Constitution, or the restraint of hereditary power. Where the representative can do as he pleases or as his constituents please, without one of these restraints, anarchy will follow and then despotism.

The true end of government is to leave each individual in the enjoyment of his natural freedom, to the utmost extent possible, consistent with the like freedom for all the rest. That government only is tolerable in which I can sit by my own fireside, where no man shall dare to enter but with my leave, except by virtue of a legal warrant prescribed in known and standing laws. Such can not continue to be our condition, unless we preserve for ever intact and intangible that sentence of the fundamental law, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Whoever, therefore, counsels, encourages, or acquiesces in a departure from the fundamental law, strikes at the foundation of our freedom.

Having thus gone through with the argument upon the

text of the Constitution, and shown that it not only gives no sanction to such extraordinary tribunals as this military commission, but that it expressly prohibits them, I will proceed further, and show that military tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government; and that just in proportion as the government of a country becomes constitutional, in that proportion the possibility of martial rule, except for martial persons, is limited or taken away.

This is a legitimate argument even upon a question of interpretation; for if there be, as I think there is not, room left for interpretation of what seem to be the plain provisions of the Constitution, then the principles of liberty, as they were understood by the Fathers of the Republic; the maxims of free government, as they were accepted by the men who framed and those who adopted the Constitution; and those occurrences in the history of older states, which they had profoundly studied, may be called in to show us what they must have meant by the words they used.

In the first place, let us consider for a moment what would be the condition of the country, if the fundamental law were otherwise than as I have stated it. The President would become in time of war, foreign or domestic, an actual dictator. He could swallow up every other power in the state.

Our learned opponents so understand it. They boldly avow it. Here are extracts from the printed brief of the Attorney-General and General Butler:

"Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler. . . .

. . . "The officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender. . . .

. . . "It is a familiar exercise of martial law to allow the Courts of a country, when it may be done with safety, to perform their ordinary func-

tions in regard to crimes committed among the people toward each other, but rarely, if ever, is any jurisdiction permitted of crimes affecting the safety, well-being, or movements of the occupying army.

"But such exercise of civil power is wholly permissive, and subordinate to the military power; and whether it shall be exercised at all is entirely within his discretion."

That notion of executive power which would make it competent to bring civilians before military commissions rests upon the theory that the commander-in-chief may do whatsoever is necessary to promote the success of his armies, and that he is the sole judge of that necessity. If any Governor of any State, or any State Legislature, or any of the Courts of the States stand in his way, the military tribunal is at hand to try, and the military platoon to arrest and execute. I know not, indeed, why Congress or the Supreme Court are sacred. Certainly, the individual members of Congress, and the individual members of this Court, must be answerable to military tribunals, like other civilians. For, if the war power may *judge* civilians, it may *judge all* civilians.

Do not say that no person will be brought before these military judges but disloyal persons, who interfere with the operations of the armies. Who is to decide this question of disloyalty or interference? I leave your presence, and as I pass out of the portico of this Capitol I meet a lieutenant, with a file of soldiers. He says to me: "You are a disloyal citizen, sir; you have interfered with the operations of the troops." I deny it. But he replies, "I will organize a drum-head court-martial, or military commission"—for I dare say he will give the milder name—"and I will try you." Such a trial can have but one result. "Courts-martial are organized to convict," says a high authority.

If this power belongs to the commander-in-chief, as commander of the whole army, it belongs to every other commander in his own sphere; for, if it exists at all, it is an incident of the command of military forces. Acts of Congress do not give it; Acts of Congress can not take it away. It inheres in the military office, and goes with it wherever it goes.

This will not only be true of the national forces, but it will be true of the State forces. The Governor of each State is as

much commander-in-chief of the State forces as the President is commander-in-chief of the national forces. The Constitution of New York, for example, declares that "the Governor shall be commander-in-chief of the military and naval forces of the State." And again: "When the Governor shall, with the consent of the Legislature, be out of the State in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the State." Any State, it will be remembered, may, according to the Constitution of the United States, "engage in war," at any time, with the consent of Congress; and without it, when "actually invaded, or in such imminent danger as will not admit of delay." Upon the theory of the war power which I am now combating, the condition of this Federal Republic of ours would be singularly deplorable and perilous, with our one Federal commander-in-chief, our thirty-six State commanders-in-chief, and any number of subordinate commanders, all armed with the power to supersede every other tribunal but their own; and their own to constitute, *when they please, of whom they please, and for whom they please.*

If the power exists independent of Congress, it may be exercised in any form which the commander may choose; persons may be arrested with or without warrant; they may be imprisoned with or without information of the cause of imprisonment; they may be brought to trial before a board of officers or privates; their judges may be partial or impartial; the evidence may be legal or illegal, or there may be none at all; the sentence may be verbal, and carried into effect without written order of any kind. It is not an answer to say that this is most unlikely to happen—nay, that it is most improbable. We are not considering probabilities, but possibilities. It *might* happen. The will of the commander-in-chief, or of his subordinates, could not be controlled by Congress, and *might* be exerted in an irregular and tyrannical manner.

It would not be a legal argument in favor of military commissions for civilians, even if it could be proved that civil tribunals are inadequate to administer that swift justice which the exigencies of war may sometimes demand. That would be an argument for amending the Constitution, not for perverting

it. But it has not been proved that the civil tribunals are not sufficient for the trial of civilians. Congress can create as many courts as it will; can endow them with functions adequate to any emergency; can make their processes as short and effective as the fiercest lover of quick justice could desire, and can prescribe such qualifications for jurors, wherever juries are necessary, as to insure a decision according to the law and the evidence. Whoever desires more than that, desires not justice, but injustice; not freedom and safety, but tyranny and peril.

If the law were otherwise, if our system of government did really sanction or tolerate such a use or abuse of military power, then I know not how we can condemn either the theory or the practice of the governments of Continental Europe, or boast of our superiority in either. What is it that separates us from them? What is it that gives us a right to boast that we are superior in our guarantees of civil rights? Private rights are as well protected in many parts of that continent as they are here. Justice between man and man has long been administered by upright magistrates and under impartial laws. Why, then, the difference between them and us? It is because the regal power, commanding military forces there, exercises military jurisdiction over the citizens. In time of war, say my learned friends, these powers may be exercised here. If so, the governments are right there. Their normal condition, it might almost be said, is that of war, foreign or domestic. For the last hundred and sixty-five years, that is, since the beginning of the war of the Spanish Succession, there has not been tranquillity throughout that continent for a single decade. France was at war with foreign nations with scarcely an interval down to 1815, and was convulsed by civil wars for many years. Spain, Austria, Prussia, and Russia had a like experience of foreign war. Armies, on a gigantic footing, have been constantly maintained. From Archangel to Gibraltar, Europe has been a vast camp. If a republican President, because he is commander-in-chief of the army and navy, can rightfully create military tribunals for the trial of civilians in time of war, much more rightfully could the kings of the elder continent do the same at the head of their great armies, in the plenitude of their kingly offices, and with scarcely a restraint in the shape of



constitutions, Parliaments, Diets, or States-General. If the doctrine or the practice is to be enforced among us, let us hear less of the military prisons of Austria and Spain.

The source and origin of the power to establish military commissions, if it exist at all, is in the assumed power to declare what is called *martial law*. I say what is called martial law; for, strictly, there is no such thing as martial law; it is martial *rule*; that is to say, the will of the commanding officer and nothing more, nothing less. Let us see if there be under our system any such power vested in the President, and, if there be, whence is it derived, and what are its limits.

On this subject, as on many others, the incorrect use of a word has led to great confusion of ideas and to great abuses. People imagine, when they hear the expression, martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial. A moment's reflection will show that this is an error. Law is a rule of property and of conduct, prescribed by the sovereign power of the state. The civil code of Louisiana defines it as "a solemn expression of legislative will." Blackstone calls it "a rule of civil conduct prescribed by the supreme power in the state," . . . "not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal." Demosthenes thus explains it: "The design and object of laws is to ascertain what is just, honorable, and expedient; and, when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all."

There is a system of regulations known as the rules and articles of war, prescribed by Congress for the government of the army and navy, under that clause of the Constitution which empowers Congress "to make rules for the government and regulation of the land and naval forces." This is generally known as *military law*.\*

There are also certain usages, sanctioned by time, for the

\* See *Mills vs. Martin*, 19 John., 722; *Martin vs. Mott*, 12 Wheat., 19; 1 Kent's Com., 870, note.

conduct toward each other of nations engaged in war, known as the usages of war, or the *jus belli*, accepted as part of the law of nations, and extended from *national* to *all* belligerents. These respect, however, only the conduct of *belligerents toward each other*, and have no application to the present case.

What is ordinarily called martial law is no law at all. Wellington, in one of his dispatches from Portugal in 1810, explained it in this manner :

“ I think it would be desirable to define with precision our ideas respecting the establishment of military law before we determine to alter the established law of the country in any case.

“ The following questions are worth consideration and decision on this topic : What is military law ? Military law, as applied to any persons, excepting the officers, soldiers, and followers of the army, for whose government there are particular provisions of law in all well-regulated countries, is neither more nor less than the will of the general of the army. He punishes either with or without trial, for crimes either declared to be so, or not so declared by any existing law, or by his own orders. This is the plain and common meaning of the term military law. Besides the mode of proceeding above described, laws have been made in different countries, at different times, to establish and legalize a description of military constitution.

“ The commander-in-chief, or the Government, has been authorized to proceed by military process—that is, by court-martial, or council of war—against persons offending against certain laws, or against their own orders, issued generally for the security of the army, or for the establishment of a certain government or constitution odious to the people among whom it is established.

“ Of both descriptions of military law, there are numerous instances in the history of the operations of the French army during the Revolution ; and there is an instance of the existence, both of the first-mentioned description and of the last-mentioned, in Ireland, during the rebellion of 1798, when the people were in insurrection against the Government, and were to be restrained by force.”

And, in his speech on the Ceylon affair, he repeats the description :

“ I contend that martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all ; therefore, the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules, and regulations, and limits, according to which his will is to be carried out. Now, I have, in another country, carried out martial law ; that is to say, I have governed a large proportion of the population of a country by

my own will. But then, what did I do? I declared that the country should be governed according to its own national law, and I carried into execution that, my so declared will."

There can be no pretense that a *military constitution*, such as is mentioned by the Duke of Wellington, in his dispatch, or any like it, was ever established in this country. Congress has never made the attempt; and, if it had, it could not have succeeded, for lack of power under the Constitution of the United States. The other description of military government is the one with which we have here to deal; that is to say, the *will of the general* commanding the army, or, as I think it should be designated, *martial rule*.

Let us call the thing by its right name; it is not martial law, but martial rule. And, when we speak of it, let us speak of it as abolishing all law, and substituting the will of the military commander, and we shall give a true idea of the thing, and be able to reason about it, with a clear sense of what we are doing. Thus explained, the proposition for which the counsel on the other side argue, and against which we argue, is that the President, in a time of war, has the power to abrogate all law, and substitute his own will in its place.

Another expression, much used in relation to the same subject, has led also to misapprehension; that is, the *declaration* or *proclamation* of martial rule; as if a formal promulgation made any difference. It makes no difference whatever. If a general or commander-in-chief has the right to enforce martial rule, upon those who are not members of his army, he may enforce it without, as well as with, a proclamation. All the purpose which that effects is to give notice of the fact.

What, it may be asked, may a general never in any case use force but to compel submission in the opposite army and obedience in his own! I answer, yes; there are cases in which he may. There is a maxim of our law which gives the reason and the extent of the power: "*Necessitas quod cogit defendit.*" This is a maxim not peculiar in its application to military men; it applies to all men under certain circumstances. If Grant, with his army, were at one end of Pennsylvania Avenue, and Lee with his at the other, and it were a necessity, in the stress of battle, to take possession of this building, you might be

driven from your seats, and the members of the two Houses of Congress from theirs; and so, too, if a fire were here raging, and the firemen found it necessary to take possession in order to extinguish the flames, they might drive judges, senators, and representatives from their chambers. These actions, both of the military and of the firemen, would be justified by the same rule of necessity, and be lawful under the same rule of law; but this would not be because there was such a law as martial law or firemen's law.

Private persons may lawfully tear down a house, if necessary, to prevent the spread of a fire. Indeed, the maxim is not confined in its application to the calamities of war and conflagration. A mutiny, breaking out in a garrison, may make necessary for its suppression, and therefore justify, acts which would otherwise be unjustifiable. In all these cases, however, the person acting under the pressure of necessity, real or supposed, acts at his peril. The correctness of his conclusion must be judged by courts and juries, whenever the acts and the alleged necessity are drawn in question.

The creation of a commission or board, to decide or advise upon the subject, gives no increased sanction to the act. As necessity compels, so that necessity alone can justify it. The decision or advice of any number of persons, whether designated as a military commission, or board of officers, or council of war, or as a committee, proves nothing but greater deliberation; it does not make legal what would otherwise be illegal. In this view, the military commission in the present case had no vitality, except as representing the commanding officer; what he might do in execution of their sentence, he might do without it. The petitioners might have been executed by him on the spot, without any form of trial, with the same legal justification as they could have been executed upon the finding and sentence actually rendered.

Passing now from these topics, if the Court please, I will proceed to the *historical* part of this argument; in the course of which I propose first to ask your attention to occurrences in our own country, and afterward to what has taken place in England and in France.

*First, as to our country.* The nation began its life in

1776 with a protest against military usurpation. It was one of the grievances set forth in the Declaration of Independence, that the King of Great Britain had "affected to render the military independent of and superior to the civil power." The attempts of General Gage, in Boston, and of Lord Dunmore, in Virginia, to enforce martial rule, excited the greatest indignation. Our fathers never forgot their principles; and though the war by which they maintained their independence was a revolutionary one, though their lives depended on their success in arms, they always asserted and enforced the subordination of the military to the civil arm.

The commission by which Washington was made "General and Commander-in-Chief of the American Forces" began thus:

"We, reposing special trust and confidence in your patriotism, valor, conduct, and fidelity, do, by these presents, constitute and appoint you to be General and Commander-in-Chief of the Army of the United Colonies, and of all the forces now raised or to be raised by them, and of all others who shall voluntarily offer their services and join the said army for the defense of American liberty, and for repelling every hostile invasion thereof: and you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service."

And his instructions closed with these memorable words:

"And whereas all particulars can not be foreseen, nor positive instructions for such emergencies so beforehand given, but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are, therefore, upon all such accidents, or any occasion that may happen, to use your best circumspection; and, advising with your council of war, to order and dispose of the said army under your command as may be most advantageous for the obtaining of the end for which these forces have been raised, making it your special care, in discharge of the great trust committed unto you, that the liberties of America receive no detriment."

These last words were nearly the formula of the Romans when a dictator was chosen.

Here was the plenitude of military power. If there was ever one who, by virtue of supreme command, had the legal and moral right to exercise martial rule over civilians; who, with any show of reason, could turn to a military purpose that much-abused maxim, *salus populi suprema lex*, it was Washington, in those perilous days when tories surrounded his camp,

carried intelligence to his enemies, and sowed distrust among his own people. The autumn of 1777 and the succeeding winter were the darkest times of the Revolution. Then, if ever, supreme military command might have claimed the prerogative of taking to itself absolute control.

There were, indeed, Committees of Public Safety, and other irregular bodies. Yet I do not find that Washington ever subjected civilians to military trial or military restraint, except in execution of particular and express injunctions from Congress or other civil authority. When, on one occasion, the arrest and detention of disaffected persons was thought necessary, Congress requested the interposition of the civil authority, by the following resolution :

*"Whereas, The States of Pennsylvania and Delaware are threatened with immediate invasion from a powerful army, who have already landed at the head of Chesapeake Bay ; and whereas, principles of policy and of self-preservation require that all persons who may be reasonably suspected of aiding or abetting the cause of the enemy may be prevented from pursuing measures injurious to the public weal :*

*"Resolved, That the executive authority of the States of Pennsylvania and Delaware be requested to cause all persons within their respective States, notoriously disaffected, forthwith to be apprehended, disarmed, and secured, till such time as the respective States think they can be released without injury to the common cause."*

The Legislature of Pennsylvania thereupon passed an act "to empower the Supreme Executive Council of this Commonwealth to provide for the security thereof in special cases where no provision is already made by law," as follows :

*"Whereas, The preservation of this State, and of all its members, and of the army acting in support thereof at the time of a hostile invasion, may require the immediate interposition of the Supreme Executive Council, when the judicial powers of the Government can not, in the ordinary course of law, sufficiently provide for its security ;*

*"And whereas for this important purpose the Supreme Executive Council of this Commonwealth have lately, at the recommendation of Congress, taken up several persons who have refused to give to the State the common assurance of their fidelity and peaceable behavior, as required by law, and it is apprehended that there are still more such persons among us who can not, at this juncture, be safely trusted with their freedom without giving proper security to the public :*

*"Be it therefore enacted, and it is hereby enacted, by the Representa-*

tives of the freemen of the Commonwealth of Pennsylvania in General Assembly met, and by the authority of the same, That it may and shall be lawful for the President or Vice-President, and the members of the Supreme Executive Council of this State, or any two of them, either *upon the recommendation of Congress*, or at the requisition of *the Commander-in-Chief of the army*, or the commander of a *division or corps* in the same, or upon the information of any credible subject of this or any other of the United States, to arrest any person or persons within this Commonwealth who shall be suspected from any of his or her acts, writings, speeches, conversations, travels, or other behavior, to be disaffected to the community of this, or all, or any of the United States of America, or to be an harbinger of the common enemy who is at our gates, or to give mediate or immediate intelligence and warning to their commanders by letters, messengers, or tokens, or by *discouraging people from taking up arms for the defense of the country*, or spreading false news, or doing any other thing to subvert the good order and regulations which are or may be pursued for the safety of the country, and to seize and examine such papers in their possession as shall in anywise affect the public; and the same persons *being arrested, to confine and remove them to any distant place*, where it will be out of their power to disturb the peace and safety of the States; or to tender to them the oath or affirmation of allegiance or fidelity to the State, as directed by law, and upon taking or subscribing the same, to enlarge them, or to demand and take such other and further security and assurance from them as the said President, or Vice-President and Council, or any two of them, in their discretion shall think proper, or as the particular circumstances of the case may require."

This act then went on to indemnify for past transactions.

This was all superfluous, if the argument of our friends on the other side rests on a good foundation. The military arm was already competent to do as much, and more; and the ceremony of a "requisition of the commander-in-chief of the army," made to the civil authority, to enable them to do what he could have done without, was as meaningless as it was unnecessary.

Even amid the destitution and suffering of Valley Forge, it does not appear to have occurred to Washington that his military command gave him the right of military control over the citizen.

I have in my hand a little book, published by an adjutant of the Revolution, containing the orders of Washington during the years 1778, 1780, 1781, and 1782. There are but four that relate to the military trial of civilians; and especial pains appear to have been taken to make known that even these were

authorized by express resolution of Congress. Thus it is stated, in a note, that the trials were had under the following authority :

*"Wednesday, October 8, 1777.*

"A motion was made, to prevent an intercourse between the towns in the possession of the enemy and the inhabitants of the country.

"Ordered, That it be referred to a committee of three.

"The members chosen : Mr. R. H. Lee, Mr. J. Adams, and Mr. Chase.

*"Four o'clock, P. M.*

"The committee to whom was referred the motion for preventing an intercourse between the towns in the possession of the enemy and the inhabitants of the country, brought in a resolution for that purpose, which was agreed to as follows :

"*Whereas*, It is of essential consequence to the general welfare that the most effectual measures should be forthwith pursued for cutting off all communications of supplies, or intelligence, to the enemy's army now in and near the city of Philadelphia; and whereas, it has been found, by the experience of all States, that, in times of invasion, the process of the municipal law is too feeble and dilatory to bring to a condign and exemplary punishment persons guilty of such traitorous practices :

"*Resolved*, That any person, being an inhabitant of any of these States, who shall act as a guide or pilot by land or water for the enemy, or shall give or send intelligence to them, or in any manner furnish them with supplies of provisions, money, clothing, arms, forage, fuel, or any kind of stores, be considered and treated as an enemy and traitor to these United States; and that General Washington be empowered to order such persons, taken within thirty miles of any city, town, or place in the State of Pennsylvania, Jersey, or Delaware, which is, or may be, in the possession of any of the enemy's forces, to be tried by a court-martial, and such court-martial are hereby authorized to sentence any such persons convicted before them of any of the offenses aforesaid, to suffer death or such other punishment as to them shall seem meet.

"This resolve to remain in force until the first day of January next, unless sooner revoked by Congress."

These precedents are evidence of the highest character to show that, though the Congress of the Revolution in this instance gave power to try by court-martial citizens who were found prowling about the armies, and giving intelligence or supplies to the enemy, yet that the commander-in-chief had not this power without the special and express authority of Congress; which authority, it may be observed, was given withal in terms so guarded, that it was limited in its operation to less than three months.



The first Constitutions of the States were framed with the same jealous care. By the Constitution of New Hampshire, it was declared that "in all cases, and at all times, the military ought to be under strict subordination to and governed by the civil power"; by the Constitution of Massachusetts, of 1780, that "no person can in any case be subjected to law martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the Legislature"; by the Constitution of Pennsylvania, of 1776, "that the military should be kept under strict subordination to and governed by the civil power"; by the Constitution of Delaware, of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to and governed by the civil power"; by that of Maryland, of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power"; by that of North Carolina, 1776, "that the military should be kept under strict subordination to and governed by the civil power"; by that of South Carolina, 1778, "that the military [should] be subordinate to the civil power of the State"; and by that of Georgia, 1777, that "the principles of the Habeas Corpus Act shall be part of this Constitution; and freedom of the press, and trial by jury, to remain inviolate for ever."

What was meant by these declarations of the bills of rights, promulgated in that revolutionary period? Was it meant that the military must be subordinate in time of peace, but paramount in time of war? Were our fathers guarding against abuse when there was no danger of it, or against it where there was danger; when the military were weak, or when they were strong; when the country had less need of their services, or when it had greater?

The Federal Constitution was afterward formed, with the provisions and guarantees which have been already considered; and, as if to make more sure that these were intended for war as well as peace, the letter with which Washington communicated that instrument to the Congress of the Confederation began as follows:

"We have now the honor to submit to the consideration of the United States, in Congress assembled, that Constitution which has appeared to us the most advisable.

"The friends of our country have long seen and desired that the *power of making war*, peace, and treaties, that of levying money and regulating commerce, and the *corresponding executive and judicial authorities*, should be fully and effectually vested in the General Government of the Union."

When this Constitution came before the people for ratification, its friends, as we know, exerted themselves to refute the objections made against it. The Federal Executive was especially an object of attack. In the sixty-ninth number of the "Federalist" is an elaborate examination of his powers, as compared with those of the King of Great Britain, on the one hand, and the Governor of New York on the other, in the course of which it is said :

"The President is to be commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same as the King of Great Britain, but in practice much inferior to it. It would amount to nothing more than the *supreme command and direction of the military and naval forces*, as *first general and admiral* of the Confederacy ; while that of the British King extends to the *declaring* of war, and to the *raising and equipping* of fleets and armies ; all which, by the Constitution under consideration, would appertain to *the Legislature*."

Even these assurances were not enough ; and though the Constitution was ratified, the amendments, which have been already discussed, were immediately proposed and adopted.

Two insurrections occurred ; one, Shay's rebellion, shortly before, and the other, the Whisky Insurrection, shortly after the adoption of the Constitution. Both were suppressed by the military ; but, on both occasions, the greatest care was exhibited to hold the military always in subordination to the civil power.

Burr's conspiracy happened in 1805. On that occasion, Mr. Jefferson sought from Congress authority to suspend the privilege of the writ of *habeas corpus*. But though the Senate passed the bill, as he desired, the House of Representatives rejected it with disdain.

The embargo gave rise to some questions, which, though not military, have a bearing on the present subject. One of them was examined and decided in the case of Brown against

the United States.\* In that case, the question was whether enemies' property, found here on land upon the breaking out of war, could be condemned without a legislative act? Mr. Justice STORRY, from whose judgment the appeal was taken, thought that the President, as an incident of his office, and especially by virtue of the Act of Congress declaring war, had authority to employ all the usual means acknowledged in war to carry it into effect; among which was condemnation of enemies' property. But this Court reversed the judgment, Chief-Justice MARSHALL giving the opinion; in the course of which he said:

"That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible by the enumeration of powers which accompany that of declaring war. 'Congress shall have power' 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.'

"It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water is to be confined to captures which are extra-territorial. If it extends to rules respecting enemies' property found within the territory, then we perceive an express grant to Congress of the power in question, as an independent, substantive power not included in that of declaring war.

"The Acts of Congress furnish many instances of an opinion that the declaration of war does not of itself authorize proceedings against the persons or property of the enemy found at the time within the territory.

"War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the President very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

"The 'act for the safe keeping and accommodation of prisoners of war' is of the same character."

I now come to the war of 1812. A proposition was then made in Congress to subject to martial trial American citizens found acting as spies. This brought a speech from Mr. Webster, part of which I beg leave to read.

\* 8 Cranch, 126.

It will be found in the annals of Congress, 1813, 1814, vol. i, p. 885. He said:

"If the proposition were to consider whether it was necessary to provide additional legal punishments for any description of offense, he should see no objection to the reference of the subject to a committee. If illegal intercourse existed with the enemy, he should go as far as any one in applying constitutional remedies to that evil. But this resolution proposes, in effect, to consider whether it is not expedient to try accusations for treason before military instead of civil tribunals. However glaring may be the idea, yet such is in truth the real nature of the proposition; it is to change the forum for the trial of treason. The mover of the resolution and the gentleman from the State of Georgia (Mr. Troup) have not left any doubt on this subject. They have alluded to cases which they suppose the resolutions to embrace, and for which they deem it necessary to provide military punishment. But what is the nature of those cases? Are they not cases of treason? It is said information has been communicated to the enemy, very material to him, respecting the operations of our own forces, by citizens of the United States. Signals are said to have been made for this purpose on the St. Lawrence and elsewhere. Do gentlemen suppose that the act of communicating to the enemy important intelligence, whether by signals or otherwise, whereby he is better able to defend himself or attack his adversary, is not treason? Is not this giving aid and comfort to the enemy? May it not be in many cases the most important service which can be rendered him? Certainly, sir, all such offenses as gentlemen have mentioned are provided for by law, and adequate penalties annexed to the commission. The simple question before us is, whether we will consider the propriety of taking the power of trying these offenses from the courts of law, where the Constitution has placed it, and confer it on the military. Sir, the proposition strikes me as monstrous. I can not consent to entertain the consideration of it even for a moment. It goes to destroy the plainest constitutional provisions. If it should prevail I should not hesitate to pronounce it a most enormous stride of usurpation."

In Stacy's case, which occurred during the same war with Great Britain, a writ of *habeas corpus* was issued to Commodore Chauncey and General Lewis, commanding on the frontiers, to bring up the body of Stacy. General Lewis stated "that he believed the said Stacy had been guilty of treasonable practices, in carrying provisions and giving information to the enemy, and that he believed a court-martial was the proper tribunal to try the said Stacy, though he was a citizen." Observe, now, what was the language of the Court, as delivered by KENT: "This is a case which concerns the personal liberty

of the citizen." . . . "The pretended charge of treason (for, upon the facts before us, we must consider it a pretext), without being founded upon oath, and without any specification of the matters of which it might consist, *and without any color of authority in any military tribunal, to try a citizen for that crime*, is only aggravation of the oppression of the imprisonment." . . . "If ever a case called for the most prompt interposition of the Court to enforce obedience to its process, this is one. *A military commander is here assuming criminal jurisdiction over a private citizen*, is holding him in the closest confinement, and contemning the civil authority of the State."

Smith *vs.* Shaw, also in the Supreme Court of New York,\* was an action growing out of the same war, and brought against a military officer for confining the plaintiff on charges of "exciting insurrection and mutiny among the good citizens of the United States"; "violating his parol as a prisoner of the enemy, and engaging in an illicit trade, to furnish the enemy with necessaries from the United States"; and "being an enemy's spy, in time of war, between Great Britain and the United States." It was argued for the defendant that the power to arrest in such a case was "essential to the public safety—'*Salus populi suprema lex.*' This is not a doctrine dangerous to liberty, or to the rights of citizens, qualified as it is with the requisites that there must be a case of necessity, a probable cause for the arrest—'*Silent leges inter arma.*'" For the plaintiff, it was replied: "It can not surely be pretended that the plaintiff, a naturalized citizen, could be treated as a spy. The plaintiff is entitled to all the benefits of our Constitution and Bill of Rights. It is one of the very grievances enumerated in the Declaration of Independence, that the King had affected to render the military independent of and superior to the civil power. It is matter of astonishment that in less than forty years, and in the life of the men who framed that instrument, it should be argued in a court of justice that this military power can be exercised in this country; in England it would not even be debated." THOMPSON, Chief Justice, delivered the opinion of the Court, and among other things said: "None of the offenses charged against Shaw are cognizable by

\* 12 Johns., 257.

a court-martial except that which related to his being a spy; and, if he was an American citizen, he could not be charged with such an offense. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy." And again: "The conduct of the defendant in this case does not appear to have been harsh and oppressive. But it is the principle involved in it which renders the question important. If the defendant is justifiable in doing what he did, every citizen of the United States would in time of war be equally exposed to a like exercise of military power and authority."

Lamb's case\* related to the extension of the rules and articles of war to the militia during the same contest. Judge BAX, giving the opinion of the Court, said:

"The constitutionality of martial law has been called in question. If by martial law is to be understood that dreadful system, the law of arms, which in former times was exercised by the King of England and his lieutenants, when his word was the law and his will the power by which it was exercised, I have no hesitation in saying, that such a monster could not exist in the land of liberty and freedom. . . . But if by this military code is meant to be understood the rules and regulations for the government of our men in arms, when marshaled in defense of our country's rights and honor, then I am bound to say there is nothing unconstitutional in such a system."

In *Johnson vs. Duncan*,† a question arose respecting the validity of martial rule, as established by General Jackson, at New Orleans, in December, 1814. MARTIN, Justice, delivering the opinion of the Court, made at the outset the following observation:

"At the close of the argument on Monday last, we thought it our duty, lest the smallest delay should countenance the idea that this Court entertain any doubt on the first ground, instantly to declare *en banc* (although the practice is to deliver our opinions in writing) that the exercise of our authority vested by the law in this Court could not be suspended by any man.

"In any other State but this, in the population of which are many individuals who, not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the Judges of this Court should, in complying with the constitutional injunction, *in all cases to adduce the reasons on which their judgment is founded*, take up much

\* 1 N. C. Law Repository.

† 3 Martin's Lou. Rep., O. S., 520.

time to show that this Court is bound utterly to disregard what is thus called *martial law*—if anything be meant thereby but the strict enforcing of the rules and articles for the government of the army of the United States established by Congress, or any act of that body relating to military matters on all individuals belonging to the army or militia in the service of the United States. Yet we are told that by this proclamation of martial law, the officer who issued it has conferred on himself, over all his fellow-citizens (within the space which he has described), a supreme and unlimited power, which, being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them."

The whole opinion is worthy of the most careful consideration.

Perhaps I ought not here to omit some mention of the subsequent resolution of Congress to refund the fine imposed upon General Jackson. This piece of history has been perverted into the sanction and support of martial rule. In reality, it gives no such sanction or support. The refunding of the money was only a testimony to the good intentions of the General, but not in the least evidence of the legality of his action, or an argument for it. At the utmost, it fell far short of an act of indemnity, such as the British Parliament often gives to an act, illegal in itself, but done in anticipation of its subsequent ratification by an omnipotent Legislature. The legal invalidity of General Jackson's action in that case bearing no analogy to the circumstances of the present, can not be better demonstrated than by the judgment of the Supreme Court of Louisiana, in the case of *Johnson vs. Duncan*, which I have just quoted.

In the year 1836 there arose a debate in the House of Representatives, in which the war power of the Federal Government was discussed by John Quincy Adams, and his speeches have been referred to now and then, as giving some countenance to the notion that it conferred very large discretionary authority upon the Executive. A slight examination, however, will show that this is a mistake. He was referring to the war power of Congress rather than of the President.

Six years later came the Rhode Island troubles. There was a contest between two rival governments; one under a colonial charter, and the other under a convention assembled in opposition to it. In the course of the contest, the Legisla-

ture of the charter government passed "An Act establishing martial law in this State." Borden was a militiaman who, by the order of his superior officer, entered Luther's house to arrest him. Luther thereupon sued Borden in the Circuit Court of the United States. The case came here, and the main question was, which of the two governments was the legal one. It was held that the charter government having been recognized by the other departments of the Federal Government, that recognition was conclusive upon this Court. The justification of the defendant was complete, when it was decided that the government under which he acted was the lawful one. The question, whether that government could place the State under martial rule did not properly arise; and, if it had arisen, it would have been a different question from that which arises in this case. The charter of Charles II imposed no restraint in this respect upon the Legislature of Rhode Island. That Legislature, in its own sphere, was as omnipotent as the British Parliament. There could arise for discussion in that case no question about martial rule under the Federal Government. The Courts of Rhode Island had already decided in favor of the charter Constitution, and of the act of the Legislature; and this Court, in deciding upon State Constitutions and State laws, follows, as everybody knows, the State Courts. The mention of the question of martial rule, however, drew the following observations from the Chief Justice, which are very significant in their bearing upon the present case:

"The remaining question is, whether the defendants, acting under military orders, issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the Legislature declaring martial law, *it is not necessary in the cause before us to inquire to what extent or under what circumstances that power may be exercised by a State.*

"Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities.

"And unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority.



The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. *And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified through the State, as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority.*

"It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable.

*"We forbear to remark upon the cases referred to in the argument in relation to the commissions anciently issued by Kings of England to commissioners, to proceed against certain descriptions of persons in certain places by the law martial.*

*"These commissions were issued by the King at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the Petition of Right in the reign of Charles I. But they bear no analogy, in any respect, to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defense, when assailed by an armed force; and the cases and commentaries concerning these commissions can not, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government."*

Four years later came the Mexican war; in the course of which General Scott, having to occupy certain conquered places, and, therefore, to keep order therein, instituted a body of regulations, in which he mentioned military commissions as one of the instruments of his government. This was, however, wholly the exercise of a belligerent right over a territory conquered; like the exercise of it in California, on its conquest.

In *Cross vs. Harrison* \* it was held, that the establishment of civil government in California was the lawful exercise of a belligerent right over a conquered country.

Harmony's case † grew out of this Mexican war. Mitchell, being an officer of the army, was sued by Harmony for seizing his property in the Mexican State of Chihuahua. Mitchell insisted, among other things, that the seizure was an act of military necessity. This question was submitted to the jury, and a point was made whether the law on that subject had been correctly laid down. "We are clearly of opinion," says the Court, speaking by Chief-Justice TANNEY, "that, in all of these cases, the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger, or necessity, in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right; and the *emergency must be shown to exist*, before the taking can be justified."

In the year 1855 hostilities with the Indians broke out in Oregon, then a Territory, and the Governor thought it proper to declare martial rule. His conduct in this respect became the subject of review at Washington, where it was disapproved. An opinion was then given by Mr. CUSHING, Attorney-General, containing some novel views regarding the subject of martial rule, and discountenancing, as I think, its assumption by the executive department.

This summary brings us to the period of our civil war. How far Congress has sanctioned or acquiesced in the assumption by the Executive of military control over civilians, we have already seen to some extent. It remains only to take notice of a debate, which occurred in the House of Representatives in the closing hours of the last Congress, a year ago, on an amendment to one of the appropriation bills proposed by Henry Winter Davis, to the effect that, when the civil courts were open, no person should be subject to military trial but

\* 18 How., 164.

† 13 How., 116.

those in the military or naval service, or rebel enemies charged with being spies. The amendment was adopted by the House ; but it was stated in the debate that, though a majority of the Senate concurred in the principle involved, they refused to pass it as part of the appropriation bill. The debate is remarkable not only for its condemnation of military trials for civilians, but for its exposure of the abuses which had sprung up. We have been told here that the power which we are opposing has never been abused ; that none have ever been convicted before a court-martial or military commission, except the guilty. In proposing this amendment, Mr. Davis said :

"I do not desire at this period of the session to detain the House, even by an argument in favor of the amendment I have submitted. I desire to state merely what it contemplates, and to beg the House to give a direct vote upon it. It is a measure which touches the very foundation of republican government—the liberty of the citizen, nothing more, nothing less.

"I do not think it is exclusively, perhaps not chiefly, the fault of those in authority that military commissions have tried, contrary to the Constitution and laws of the United States, many of its citizens. It began first in the rebel States, then spread to the border States, the theatre of armed conflicts, then invaded Pennsylvania, Indiana, and New York, amid the general acclaim of the people ; and now that it reaches as far north as Boston we hear the first murmur of its advocates or instigators. What that amendment contemplates is, not to cast imputation upon any Administration or any officer, but, recognizing the error which the people as well as the Government have in common committed against the foundation of their own safety, now, before the very idea of the supremacy of the law has faded from the country, to restore it to its power.

"This amendment is confined rigidly to the loyal States, to the States in which the Courts of the United States are open ; to the States whose governments the United States guarantee ; so that it does not strip the Government of any power, legal or usurped, which it has thought necessary in its efforts to suppress the rebellion. It leaves everybody to be tried by court-martial who is actually in the military service of the Government, or who, being a rebel enemy, is arrested as a spy. But it annuls everything that has been done heretofore under illegal military commissions ; directs all persons now in illegal confinement under sentence of illegal military commissions to be either discharged or delivered to the civil tribunals, to be there proceeded against according to law. There the amendment stops.

"I desire to make an imputation on no one. This amendment is proposed for the benefit of every party and of every Administration. And I trust that the House will allow it to be incorporated into this bill, that it

may become the acknowledged as it is now the supreme law of this land and the right of the citizen."

Mr. Dawes, of Massachusetts, who still is and has been for many years at the head of the Committee on Elections, and than whom there is not a more loyal and true man in all the country, said :

"I believe that during the time I have served in Congress I have, to the extent of my ability, devoted myself to the effort to ferret out and punish those who have been engaged in defrauding the Government. During the last Congress, I devoted, I think, some part of my strength, I know I did a great deal of my time, to that kind of work, calling down upon myself the curses of those who had been engaged as contractors and otherwise in supplying the Government. In carrying out what I was endeavoring to do, I, in coöperation with others, reported to the House a bill which became a law, making contractors with the Government, and those engaged in supplying it, subject to trial by court-martial. I was aware that it was an extreme measure ; but I felt at that time that it was necessary to check what seemed to be a growing and an alarming evil. In putting into the hands of the officers of the Government this extreme power, I had confidence that they would exercise it with moderation and reason. But, Mr. Chairman, I am sorry to say that my observation of the administration of that law, of which I take to myself some part of the responsibility, has been such during the past year or two as to compel me to support this amendment. Sir, we seem to have lost sight, in the execution of that law, of the guarantees of the Constitution. We seem to forget that civilians charged with offenses have any right to trial by jury or a knowledge of the offenses for which they are frequently incarcerated in prison.

"Sir, we seem to be taking very little note of the direction in which we are drifting. Day before yesterday I voted for a bill, and I will read its title. It seemed harmless enough. It is a bill 'to provide for the better organization of the pay department of the navy.' It became a law so far as votes in this House were needed for that purpose. There was nothing in its title to attract attention. But, to my astonishment, on turning to the last section I found a provision which I did not and could not suspect from anything indicated by the title, and which is of so extraordinary a character that I am glad that a motion has been entered to reconsider the vote by which it passed this House that I can expose its enormous character. I now call the attention of members to this section to show how unconcernedly we are drifting along in this current, without seeming to be aware of it, into the strangest state of things that ever existed under a free government. In a bill with the title which I have given, it is enacted in the third and last clause that every one, not only in the naval service, but every servant of everybody in the employ of the Navy Department, every little servant who goes in and out of the doors of the Navy Depart-

ment, every driver of a team which happens to be loaded with supplies for the Navy Department, every one, and every one's agent or servant who happens to deal with the Navy Department, shall be subject to trial by court-martial for any alleged offense in such dealing. Every man in the employ of the Navy Department, every agent, employee, or servant connected with that department, in all its ramifications, is subject to be tried by court-martial. And the punishment to be inflicted by that court-martial, without trial by jury in the form guaranteed by the Constitution, is to be a fine not exceeding \$10,000, and imprisonment in any penitentiary of the United States not exceeding ten years. I understand from high authority in the Navy Department, from which this section has come, that courts-martial are not organized like courts of law, to guard the rights of the accused and secure justice, but are organized to convict. . . .

"I have, in the last fortnight, had the painful duty devolved upon me to read the proceedings of a court-martial under the law which I reported to the House some two years ago. It is one which, I venture to say, has hardly a parallel for the bitter malignity which seems to run through the whole proceedings, and for wider departure from old and established rules of law, of which the accused were the victims, and by which they were hunted since the days of Jeffreys."

Mr. Schenck, the chairman of the Military Committee, and a general in the Union army, said :

"We again here, the other day, passed a section in an appropriation bill, infringing in the same way on the right of the citizen to be tried only by the civil courts, and not by military tribunals. I understand that it was done inadvertently ; I was not in the Hall at the time ; and I should cheerfully vote to reconsider in order to get rid of the section referred to."

Mr. Ganson, a member from New York, without whose vote and efforts the constitutional amendment would hardly have passed the Lower House of Congress, took similar ground. Mr. Davis said in a subsequent part of the debate :

"But, sir, what do you say with reference to trials for things that are not crimes under any law, for things that are not defined to be crimes, civil or military ? What do you say to the trial of a loyal citizen, in the city of Baltimore, upon the charges and specifications which I hold in my hands, for forging Jefferson Davis's currency ? One of my constituents *is now in jail under those specifications*, having been tried and condemned by a military tribunal for attempting to break down the rebel currency ! I can state no other fact that will better illustrate the insolence of irresponsible military tribunals, known to no law, appointed under no law, restrained by no law, authorized by nobody, bound by no law but the will of the men who sit in their uniforms to try the rights of American citizens, according to the law of the sword." And again : "The public safety

never has required these illegal and summary trials; it now requires that they cease. The past, men are ready to forget—the American people most of all; they instigated or tolerated the usurpations of those in authority; but they now have felt the sharpness of military justice, and demand of their rulers a return to the Constitution and laws. If heretofore they have violated the law and Constitution—I do not say criminally, I do not say with intent to oppress, I do not say, even knowing it to be criminal—it was the common error; and they may plead the error of the people which misled the leaders of the people at the beginning of the rebellion. More firmness, more knowledge, more coolness in high places, might perhaps have arrested the popular current, and silenced the popular tumult, and kept the torrent within the bounds of law. It was not found in places of authority; all bowed before the storm; all floated with the current."

This brings the history of this question in our American annals down to the present time. Nothing which I might say could add to the impression which these authorities and this history must leave on the mind of every candid man, that, whatever may be the law in other countries, in this, a military commission, such as we are considering in the present case, is a gross and monstrous usurpation. It is manifest that the toleration of it for a moment is something new, and it is marvelous that it should ever have received the smallest countenance. That it should have been so, is owing to the new and extraordinary circumstances in which we were suddenly placed; to our previous unacquaintance with large armies; to our inexperience of the evils of military rule; and, above all, to the absorption of almost every man's thought, will, and action in the one great vital task of sustaining and augmenting the physical forces of the country for its struggle with rebellion.

I will, however, now proceed a step further, and show that *in England*, from which country we have received all her legal guarantees, and have added to them, as we think, many more—in constitutional England the historical argument would be also conclusive.

The constitutional history of England is the history of a struggle on the part of the Crown to obtain or to exercise a similar power there. The power claimed by the King was as much in virtue of his royal prerogative and of his feudal relations to his people as lord paramount, as of his title as commander of the forces. How that struggle was carried on from

the days of Runnymede, down; with what various fortune, what alternations of success and defeat, till its final settlement, it were needless to recount in this presence.

More than five hundred years ago, in the reign of Edward II, during a violent civil commotion, much more like war than anything that has ever been seen in the States of Indiana and Illinois, the Earl of Lancaster, at the head of a large army, being defeated by the superior forces of the King, was condemned by court-martial and beheaded. This proceeding was reversed on petition of error in the first Parliament of Edward III, and the following declared :

1. "That in time of peace, no man ought to be adjudged to death for treason, or any other offense, without being arraigned and held to answer ; 2. *That regularly, when the King's courts are open, it is a time of peace, in judgment of law ;* and, 3. That no man ought to be sentenced to death, by the record of the King, without his legal trial *per pares*."

Three hundred years later, Charles I, in time of war, finding the means wanting for its vigorous prosecution, had resort to forced loans, and by warrant of his privy councilors, committed Sir Thomas Darnell and three other gentlemen to the Tower for refusing. They brought a *habeas corpus* for their deliverance, but, it being argued that the commitment by the King, for reasons of state, was sufficient cause, the petitioners were remanded. The first Parliament, however, that was afterward summoned, called the Judges to account for this judgment, and after a severe struggle between the Commons and the Crown, which lasted from March to June, 1628, during which Coke and Seldon maintained the debate on the part of the subject, it was finally resolved, by the Petition of Right, among other things, that whereas divers *commissions* have been issued, "by which certain persons have been assigned and appointed commissioners, with power and authority to proceed within the land according to the justice of martial law," "the aforesaid commissions for proceeding by martial law should be revoked and annulled, and that thereafter no commissions of like nature should issue forth to any person or persons whatsoever." \*

\* Sir Thomas Darnell's case, 7 Hargrave's State Trials, 114, and 3 Howell's State Trials, 1-174, 225, 230, 234.

The champions of the Parliament in the contest over the Petition of Right declared: "Without all question, the very point, scope, and drift of Magna Charta was to reduce the regal to a legal power, in matter of imprisonment, or else it had not been worthy so much contending for." \*

From the day when the answer of the sovereign was given in assent to this Petition of Right, courts-martial for the trial of civilians, upon the authority of the Crown alone, have always been held illegal. During the great rebellion, when the whole land was ravaged by the opposing armies of the Parliament and the King, irregular and illegal trials sometimes occurred, but only to be pointed out and condemned by the historian. Hume observes, upon the history of the Commonwealth :

"The Earl of Derby, Sir Timothy Featherstone, and Bemboe, being taken prisoners after the battle of Worcester, were put to death by sentence of a court-martial; a method of proceeding declared illegal by that very Petition of Right for which a former Parliament had so strenuously contended, and which, after great efforts, they had extorted from the King."

This trial is narrated in 5 State Trials, 294, where it appears to have been ordered by Cromwell, not by virtue of his executive or military authority, but by direction of Parliament; as was also the trial of Waller and others, narrated in 4 State Trials, 626. In both cases, the Court was composed partly of civilians, and was denominated a high commission, or council of war.

Hale, in his history of the common law, says (page 34) :

"Touching the business of martial law, these things are to be observed, viz :

"*First.* That, in truth and reality, *it is not a law*, but something indulged, rather than allowed as a law; *the necessity of government, order, and discipline in an army*, is that only which can give those laws a countenance, *quod enim necessitas cogit defendit.*

"*Secondly.* *This indulged law was only to extend to members of the army, or to those of the opposed army*, and never was so much indulged as intended to be executed or exercised upon others, *for others who were not listed under the army had no color or reason to be bound by military con-*

\* 3 Howell's State Trials, 174; Sir Benjamin Rudyard's Reply.



*stitutions*, applicable only to the army, whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, *though it were a time of war.*

“*Thirdly.* That the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace.”

After the restoration of Charles, notwithstanding the severity shown to the adherents of the Commonwealth, during the reaction of James II, and the introduction of William of Orange, notwithstanding the cruelties arising out of the invasion of the Pretender, and out of the Irish rebellion, I do not find the case of a single person, not connected with the army, suffering death from a court-martial. I find, indeed, only four cases of courts-martial in the state trials: the two which I have mentioned as occurring in the time of the Commonwealth, and two others occurring in the time of the Irish rebellion. In one of these, that against Devereux,\* the sentence was transportation; and in the other, that of Wolfe Tone,† though the sentence was death, the Court of King’s Bench in Ireland issued a writ of *habeas corpus*, and ordered the Sheriff to take the prisoner and the Provost Marshal into custody, and prevent the execution. Even these courts-martial in Ireland, I infer from the Duke of Wellington’s dispatch, already quoted, must have been authorized by an Act of the Irish Parliament. Whether that were so or not, the proceedings of the Irish Government at that period, begotten partly of cruelty and partly of fear, can not justly be drawn into precedent. Even in respect to the government of troops in England, and the establishment of courts-martial for military offenses committed by military men, the sovereign has no authority, except as derived from the annual “Mutiny Act.”

Upon the accession of William and Mary to the throne of England, whenever extraordinary measures were thought necessary for the public safety, application was made to Parliament. Witness the following on the 1st of March, 1688:

“Mr. HAMDEN, one of his Majesty’s most honorable Privy Council, acquainted the House that he had a message from his Majesty, ‘that his Majesty had had credible information that there are several persons in and about this town that keep private meetings and cabals, to conspire against

\* 27 State Trials, 1138.

† 27 State Trials, 614.

the Government, and for the assistance of the late King James; that his Majesty has caused some of those persons to be already apprehended and secured upon suspicion of high treason, and that he thinks he may see cause to do so by others, within a little time; but his Majesty is between two great difficulties in this case; for that, if he should set those persons at liberty that are apprehended he would be wanting to his own safety, and the safety of his government and people: on the other hand, if he should detain them, he is unwilling to do anything but what shall be fully warranted by law, which he hath so often declared he will preserve; and that, therefore, if those persons should deliver themselves by the Act of Habeas Corpus, there would be another difficulty. That his Majesty is likewise unwilling that excessive bail should be taken in this case, his Majesty remembering that to be one article of the grievances presented to him; that ordinary bail will not be sufficient, for men that carry on such designs, in hopes of succeeding, will not stick at forfeiting a small sum; and that this falling out when the Parliament is sitting, his Majesty, therefore, thought fit to ask the advice of this House therein, and intends to advise with the Lords also."

"*Resolved, nem. con.*, That the humble thanks of this House be returned to his Majesty for his most gracious message in desiring the advice of this House.

"*Resolved*, That a temporary bill be brought in to empower his Majesty to apprehend and detain all such persons as he shall have just cause to suspect are conspiring against the Government.

"*Ordered*, That Mr. Hamden, Sir Richard Temple, Mr. Pollexfen, Mr. Sacheverell, Sir Thos. Lee, Sir Thos. Clarges, Sir John Holt, Mr. Brewer, do immediately withdraw into the Speaker's chamber, and prepare the said bill, and bring the same in with all convenient speed."

Of this act Macaulay writes: "The malcontents out of doors did not fail to remark that in the late reign the Habeas Corpus Act had not been one day suspended," and in another place, vol. iii, p. 87, he says: "Even James did not venture to inflict death by a sentence of a court-martial."

Blackstone (Book I, pp. 413, 414) says: "For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality, no law, but something indulged, rather than allowed as a law. The necessity of order and discipline *in an army* is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land. Wherefore Thomas, Earl of Lancaster, being condemned at Pontefract, 15 Edward II, by martial law,

his attainder was reversed, 1 Edward III, because it was done in time of peace. And it is laid down that, if a lieutenant, or other that hath commission of martial authority, doth, in time of peace, hang or otherwise execute any man, by color of martial law, this is murder, for it is against *Magna Charta*. The Petition of Right, moreover, enacts that no soldier shall be quartered on the subject without his own consent, and that *no commission shall issue to proceed within this land according to martial law.*"

Lord Loughborough, delivering the judgment of the King's Bench, in *Grant vs. Sir Charles Gould* says : \*

"*Martial law*, such as it is described by Hale, and such also as it is marked by Mr. Justice BLACKSTONE, *does not exist in England at all*. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the Constitution, and which has been for a century totally exploded.

"In the reign of King William there was a conspiracy against his person in Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law. And, within a very recent period, the incendiaries who attempted to set fire to the docks at Portsmouth were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law, but, where they are ordinary offenses against the civil peace, they are tried by the common law Courts. *Therefore, it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain.*

"The object of the Mutiny Act, therefore, is to create a Court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers, and the object of the trial is limited to military duty. Even by the extensive power granted by the Legislature to his Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are, though necessary to the regularity and discipline of the army."

The case to which Lord Loughborough refers, as occurring at Portsmouth, is, doubtless, the case of Hill, given in 20 State Trials, 1320. This man had the audacity to pretend that he was encouraged by Silas Deane to set fire to the English docks,

\* 2 H. Black., 69, 98.

and even intimated that this enterprise had the countenance of Dr. Franklin! It is a curious instance of the delusion which sometimes takes possession of whole communities, that the English people really believed this absurd pretense.

The preamble to the first Mutiny Act, passed in the time of William and Mary, recited that, "Whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm." In subsequent acts the words "in time of peace" are inserted after the word "subjected," but this must be understood as referring to the time of peace defined by Coke.

The acts which have been framed at different periods for the suspension of the privilege of *habeas corpus*, and for indemnity to the ministers against prosecutions for extreme measures, give no sanction, in any shape, to courts-martial. The suspension extends only to the privilege of relief from temporary imprisonment, and the indemnity is from the consequences of ordering it.

The case of the Rev. Mr. Smith, which occurred in Demerara in 1823, gave rise to a debate in the British Parliament, that will be for ever famous for the speeches of Brougham and Mackintosh. The latter, especially, took occasion to examine the foundation of the claim to exercise martial rule; and his explanation and reasoning will always be accounted high authority.

Subsequently, a case under Lord Torrington occurred in Ceylon. Here again arose a debate in the British Parliament, during which Wellington made the speech from which I have quoted; and there was also an elaborate examination of the subject before a committee of the Commons in 1849.

There have been also proclamations of martial rule by other English colonial governors, in a few instances: twice in New Zealand, and twice in Australia; but these exhibitions of a little brief authority in remote dependencies have received great animadversion in the mother-country. In the "English Law Magazine," of November, 1861, is an exposure of the lawlessness of the authority which these colonial governors took upon themselves to exercise.

Lastly, within six months Gordon's case in Jamaica has renewed the discussion about the legality of martial rule. There was a statute of the Colonial Legislature, providing for its establishment; but nevertheless the opinion of English counsel and of the English public appears to be that the act of the Governor of Jamaica was without warrant in law, and that he ought for it to be brought to exemplary punishment.

These various debates, discussions, and opinions are abundant evidence that martial rule for others than martial persons will never be tolerated by the free people of England.

Even when courts-martial have been authorized, their abuses have been punished with great severity. The case of Governor Wall, who was hanged in England, in 1802, for causing a sergeant, at Goree, in Africa, in 1782, to be whipped till he died, is given in the *State Trials*, vol. xxviii. There is also a case of *Wright vs. Fitzgerald*, in 27 *State Trials*, where the plaintiff recovered £500 for cruelties practiced during the Irish rebellion under color of the despotic power given by the Irish Parliament and the Lord Lieutenant. The case of Lieutenant Frye, mentioned in *McArthur on Courts-martial*, is refreshing to all who love to see the law vindicated, the dignity and independence of the judiciary maintained, and the insolence of power humbled.

Let us turn now to *France*, as France was when she had a constitutional government. I have shown what the King of England can not do. Let me show what the constitutional King of France could not do.

On the Continent of Europe, the legal formula for putting a place under martial rule is to declare it in a state of siege; as if there were in the minds of lawyers, everywhere, no justification for such a measure but the exigencies of impending battle. The charter established for the government of France, on the final expulsion of the first Napoleon, contained these provisions:

ART. —. "The King is the supreme chief of the state; he commands the forces by sea and land; declares war; makes treaties of peace, alliance, and commerce; appoints to every office and agency of public administration; and makes rules and ordinances necessary for the execution of the laws, without

the power ever of suspending them, or dispensing with their execution."

**ART.** —. "The King alone sanctions and promulgates the laws." **ART.** —. "No person can be withdrawn from his natural judges." **ART.** —. "Therefore there can not be erected commissions or extraordinary tribunals." When Charles X was driven from the kingdom, the last article was amended by adding the words, "under what name or denomination soever," Dupin giving the reason thus: "In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever,' for specious names have never been wanting for bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Now, it so happened that two years later the strength of these constitutional provisions was to be tested. A formidable insurrection broke out in France. The King issued an order, dated June 6, 1832, placing Paris in a state of siege, founded "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th; on attacks upon public and private property; on assassinations of national guards, troops of the line, municipal guards, and officers in the public service; and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." On the 18th of June, one Geoffroy, designer, of Paris, was by a decision of the second military commission of Paris declared "guilty of an attack, with intent to subvert the Government and to excite civil war," and condemned to death.

He appealed to the Court of Cassation. Odilon Barrot, a leader of the French bar, undertook his case, and after a discussion memorable for ever for the spirit and learning of the advocates, and the dignity and independence of the Judges, the Court gave judgment that—

"Whereas, Geoffroy, brought before the second military commission of the first military division, is neither in the army nor impressed with a military character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction and the provisions

of Articles 53 and 54 of the charter and those of the laws above cited: On these grounds the Court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom, and especially the judgment of condemnation of the 18th of June, instant; and, in order that further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," etc.

Thereupon this King, invested with the purple, born of a race of kings, the descendant of St. Louis, with all the traditions of the monarchy to uphold him, with the marshals of France commanding, in the streets of Paris, a large and veteran army—this King nevertheless bowed before the Judges, and released the prisoner from military custody.

Mark now the change which has taken place in France. When the government of Louis Philippe was replaced by a republic, the power of declaring a state of siege was taken from the Executive and given to the Legislature. But when Louis Napoleon began his usurpation his first step was to issue this decree of the 2d of December:

"The President of the Republic decrees:

1. "The National Assembly is dissolved.
2. "Universal suffrage is reestablished.
3. "The French people are convoked in their various districts from the 14th to the 21st of December.
4. "*The state of siege is declared in the whole extent of the first military division.*
5. "The Council of State is dissolved."

By these means he was enabled to plant his foot on the necks of thirty millions of the French. And when he afterward came to frame the Constitution of his empire, he inserted this article: "He (the Emperor) has the right of declaring a state of siege in one or more departments, provided that he inform the Senate thereof with the least delay."

This brief account of the practice of the three great constitutional governments of modern times shows us that, in the degree in which a country becomes free, in that degree the military is made dependent upon and subordinate to the civil power. *Silent leges inter arma* was never the maxim of free and brave men. They prefer that other and better maxim, *Cedant arma togæ*; and the spirit which prevailed when Ro-

man citizenship was a sign of freedom as well as glory, and the proud words, "I am a Roman citizen," were a protection against lawless power in the depths of Scythian forests or under the shadow of African mountains. May we not expect that from this day forth the prouder claim, "I am an American citizen," will be a title and guarantee of freedom from all human rule but of the law of the land!

Here, then, if the Court please, I close my argument against the competency of the military commission which was convened at Indianapolis in the autumn of 1864 for the trial of the petitioners.

It remains to consider what REMEDY, if any, they had against this unlawful judgment and its threatened execution.

The great remedy provided by our legal and political system for unlawful restraint, whether upon pretended judgments, decrees, sentences, warrants, orders, or otherwise, is the writ of *habeas corpus*.

The writ of prohibition from Circuit Courts is not authorized by Congress, except to the District Courts. Probably the State Courts might issue it, but that course would be more likely to lead to a collision than if the remedy came from the Federal tribunals. And it would be at the best but a dilatory proceeding; and before its termination the mischief might be remediless. The writ of *mandamus* is altogether inappropriate.

The remedy which each of the petitioners asked in the present case was, "that under the Act of Congress approved March 3, 1863, entitled 'An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases,' he may [might] be brought before this Court by writ of *habeas corpus*, or such other process as the Court [might] award for that purpose; together with the cause of his caption and detention; to do and receive whatsoever the Court [might], upon full and final hearing, order and adjudge in relation thereto, in pursuance of the Act of Congress aforesaid; and that, at all events, he [might] be delivered from said military custody and imprisonment; and, if found probably guilty of any improper conduct or offense against the United States of America, turned over to the proper civil tribunal for inquiry and punishment, according to law, or for discharge from custody altogether."



The Act of Congress, referred to in this prayer, has been already referred to, but a little more detail may be now necessary. After declaring that "a list of the names of all persons, citizens of States in which the administration of the law has continued unimpaired in the said Federal Courts, who are now or may hereafter be held as prisoners of the United States, by order or authority of the President of the United States, or either of said Secretaries, in any fort, arsenal, or other place, as State or political prisoners, or otherwise than as prisoners of war," it proceeds to enact that "in all cases where a grand jury, having attended any of said Courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the Judge of said Court forthwith to make an order that any such prisoner, desiring a discharge from said imprisonment, be brought before him to be discharged; and any officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute such order; and in case he shall delay, or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars, and imprisonment in the county jail for a period not less than six months, in the discretion of the Court." By the third section it is provided that, if the list is not furnished, any citizen may apply, on oath, for the order.

Whether, therefore, in the present case, the remedy should be by the technical writ of *habeas corpus*, or by a still more summary order in the nature of the writ, does not appear to be material. The questions certified, relating to the remedy, are: 1. Whether the writ of *habeas corpus* ought to be issued; and, 2. Whether the petitioner ought to be discharged.

The writ and the order may be equally efficacious, but, inasmuch as the order may certainly take the form of the writ, and as the proceedings upon the writ are well understood, and as that great writ of freedom lies as deep in the foundations of the law as in the hearts of freemen, the argument may be addressed chiefly to that. Recurring, therefore, to the three propositions concerning the remedy which I stated at the outset

of my argument, I shall proceed to discuss them. The argument will, of course, be much abridged, by what has been already observed respecting the nature and extent of martial power.

The authority to suspend the privilege of the *habeas corpus* is derived, it is said, from two sources: first, from the martial power; and, second, from the second subdivision of the ninth section of the first article of the Federal Constitution.

As to the martial power, I have already discussed it so fully that I need not discuss it again. I trust it has been shown that this power—the war power, as it is fashionable to call it—belongs to Congress, and not to the President; and that his function is to execute, in that respect, the will of Congress. His power is no more the war power than is that of General Grant, or any other subordinate; for the President, as commander-in-chief, is only, as Hamilton describes him, the “first general and admiral of the confederacy.”

If the President, as commander-in-chief of the army, navy, and militia in the Federal service, has not the power of martial rule over others than martial persons, he can not control them either by trial or arrest, or detain them, against the interposition or in defiance of the judicial power. As a question, therefore, under what has been incorrectly called the war power of the President, I submit that it is no longer worth considering.

How, then, stands the question, upon the text of the Constitution? This is the language: “The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.” My argument will be confined to this phrase and its true interpretation. Its importance, upon the present occasion, consists in this: If the President, and he alone, is invested by this clause with the power of suspending the privilege—if he can not be controlled by Congress in its exercise—then I know not how the petitioners could be relieved from the custody of the Provost Marshal, however illegal their trial and conviction may have been.

Each of the three great departments of Government is independent in its own sphere, and, if it be once granted that

the power in this respect belongs to the President alone, I am unable to perceive that Congress can rightfully control him in its exercise, or subject his discretion to theirs.

The clause in question certainly either grants the power or implies that it is already granted, and in either case it belongs to the legislative, executive, and judicial departments, concurrently, or to some, excluding the rest.

There have been four theories: one that it belongs to all the departments; a second, that it belongs to the Legislature; a third, that it belongs to the Executive; and the fourth, that it belongs to the Judiciary.

Is the clause a *grant* or a *limitation* of power? Looking only at the form of expression, it should be regarded as a limitation; like the next subdivision which is in these words: "No bill of attainder or *ex post facto* law shall be passed."

In no other part of the Constitution is such a phrase used to express a grant of power. The advocates of such a construction are obliged to say that the clause is elliptical, and should be read as if it were as follows: The privilege shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it, *and then it may be suspended*. This is a strained construction, not at all in harmony with the general simplicity of the Constitution.

Next, as a grant of power it would be superfluous, for it is clearly an incident of others which are granted. Take, for example, the power to raise and support armies. In a time of war, the unrestrained issue of the writ might seriously embarrass the Government in keeping together under proper discipline either recruits or drafted men; for which reason it might be necessary or proper to suspend the privilege during the exigency. Can it be doubted that Congress would have the power to enact that, while the exigency lasted, no soldier should be brought before a State Court on *habeas corpus*?

Then, regarding the clause according to its place in the Constitution, it should be deemed a *limitation*; for it is placed with six other subdivisions in the same section, every one of which is a limitation. It implies that the power has been already granted, just as, in the fourth and sixth subdivisions, a power is implied. Thus the fourth declares that "no capita-

tion or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken," and the sixth, that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law."

If the sentence respecting the *habeas corpus* be, as I contend, a limitation, and not a grant of power, we must look into other parts of the Constitution to find the grant; and if we find none making it to the President beyond his appointment as commander-in-chief, and it has been shown that there is none in that, it follows that the power is in the legislative or the judicial department. How it should be in the judiciary, it is not easy to see. That department has no other function than to judge. It can not refuse or delay justice. But, if it were assumed that the power of suspending the privilege of the writ belongs to the judicial department, it is quite clear that the present is a case where the writ would not be denied by the Courts, or any of its privileges withheld.

If the clause in question be deemed a *grant* of power, the question occurs, To whom is the grant made? The following considerations go to show that it is to be deemed as made to Congress:

*First.* The debates in the Convention which framed the Constitution seem at least to suppose that the power was given to Congress, and to Congress alone.

*Second.* The debates in the various State Conventions which ratified the Constitution do most certainly proceed upon that supposition.

*Third.* The place in which the provision is left indicates, if it does not absolutely decide, that it relates only to the powers of Congress. It is not in the second article which treats of the executive department. It is not in the third, which treats of the judicial department. It is in the first article, which treats of the legislative department. There is not another subdivision in all the seven subdivisions of the ninth section which does not relate to Congress in part, at least, and most of them relate to Congress alone.

Thus, the first is: "The migration or importation of such persons as any of the States now existing shall think proper to

admit, shall not be prohibited by the Congress prior to 1808," etc. That is clearly a restriction upon Congress. The second is: "The privilege of the writ of *habeas corpus* shall not be suspended," etc. Third: "No bill of attainder, or *ex post facto* law, shall be passed." That is clearly a limitation on Congress. Fourth: "No capitation, or other direct tax, shall be laid, unless in proportion to the census," etc. That is a limitation upon Congress. Fifth: "No tax or duty shall be laid on articles exported from any State." That also is a limitation upon Congress. Sixth: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another," etc. That is a restriction on the powers of Congress. Seventh: "No money shall be drawn from the Treasury but in consequence of appropriations made by law," etc. That is a restriction upon all departments of Government; upon Congress not less than the others; and finds its proper place here, because it is Congress that appropriates money. Eighth: "No title of nobility shall be granted by the United States." Does anybody suppose that to be a restriction on the President? Could he grant a title of nobility? And then follows a general restriction: "No person holding any office of profit or trust under them" [the United States] "shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

The Constitution is remarkable for its arrangement of the subjects embraced in it. There is scarcely another instrument to which the rule, *noscitur a sociis*, can be better applied for its interpretation. The different topics are grouped together, with a careful regard to their proper places. Thus it begins, in its first article, with creating, empowering and restricting the legislative department; passing, in the tenth section, to restrictions upon the States, in matters which, for the most part, pertain to Congress, or in which the States might thwart the policy of Congress. If the clause respecting the *habeas corpus* be a grant of power to the *President*, it is the only one in the whole article. Not only does the article contain no grant to that officer, but the ninth section contains no grant to any of the departments of Government.

*Fourth.* The constitutional law of the mother-country had been long settled that the power of suspending the privilege of the writ, or, as it was sometimes called, suspending the writ itself, belonged only to Parliament. With this principle firmly seated in the minds of lawyers, it seems incredible that so vast a change as conferring the grant upon the Executive should have been so loosely and carelessly expressed.

*Fifth.* The prevailing sentiment of the time when the Constitution was framed was dislike and dread of Executive authority. It is hardly to be believed that so vast and dangerous a power would have been conferred upon the President, without providing some safeguards against its abuse.

*Sixth.* Every judicial opinion, and every commentary on the Constitution, up to the period of the rebellion, treated the power as belonging to Congress, and to that department alone.

Taking thus the context, the universal understanding of the time, the contemporaneous exposition, the subsequent commentaries, and the political reasons which may be supposed to have affected the statesmen of that day, the argument should seem to be conclusive that the power of suspending the privilege of the writ of *habeas corpus* appertains to the legislative department of the Government, and to that alone. It has, I know, been argued that there is an incongruity in authorizing Congress to suspend its own law. This is too narrow a view of the subject. The States have judicial establishments which can and do issue writs of *habeas corpus*, a hundred-fold more in number than the writs issued from the Federal Courts. Indeed, it may be regarded as a provision made, rather in reference to the writ of *habeas corpus* in the States, than to the writ as likely to be issued under the authority of Congress.

The straits to which the country was reduced during the late wicked rebellion, and the omission of Congress for two years to authorize the suspension of the privilege, gave rise to a series of discussions on the subject. Most of the writers—indeed, I believe, all but three—took decided ground for the interpretation which, I submit, is the true one. One of the three supposed the power to reside in the judicial department.

Among those who thought it belonged to the Executive, there was one so able and distinguished that I can not forbear mentioning his name in this connection. Horace Binney, "*clarum et venerabile nomen*," argued, with all his ability, for that interpretation which gave the power to the President, to be exercised, not in a military but in a civil capacity. The authority of that great man, the acknowledged head of the bar of his country, is such that, if it could not give the interpretation an adequate sanction, nothing else may be expected to do it.

Supposing, then, the power to belong to Congress, as I have endeavored to show that it does, we find it exercised by the Act of March 3, 1863, and by none other. The first section of that act is as follows :

"That during the present rebellion, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by the authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner, under authority of the President, further proceedings under the writ of *habeas corpus* shall be suspended by the Judge or Court having issued the said writ so long as said suspension by the President shall remain in force, and said rebellion continue."

Without stopping to consider whether the power could be delegated by Congress, or, if it could, whether the delegation could be made in terms so general, I pass to an examination of the President's action under the act. There were two proclamations on the subject issued by him afterward. One was on the 15th of September, 1863, and declared :

"That the privilege of the said writ shall now be suspended throughout the United States, in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted, or mustered, or enlisted in or belonging to the land and naval forces of the United States, or as deserters therefrom or otherwise amenable to military law, or the rules and articles of war, or the rules and regulations prescribed for the military or naval forces

by authority of the President of the United States, or for resisting a draft, or for any other offense against the military or naval service."

The proclamation of July 5, 1864, related only to the State of Kentucky.

If, therefore, for the sake of the argument, we admit that, when the petitioner was first arrested, the privilege of the writ was suspended as to him by virtue of the Act of March, 1863, and the President's proclamation of September, 1863, it is nevertheless certain that under the first section of the act the writ ought to issue, leaving the further disposition of the case to depend upon the return or certificate mentioned in the section, and that under the third section of the act the suspension ceased at the end of twenty days from the 27th of January, 1865, that is, on the 17th of February of that year. A term of the Circuit Court of the United States was held on the 2d of January, 1865, and adjourned on the 27th of the same month. At this time a grand jury was empaneled, sworn, and charged, and adjourned without finding any indictment or presentment against the petitioners. The sentence against them was approved and promulgated more than two months afterward. Therefore, by this Act of Congress, duly passed and approved by the President, the petitioners were entitled to the writ, or an order in the nature of a writ, that they might be discharged.

And so we submit to the Court that the answers to the three questions, certified by the Court below, should be, to the first, that, on the facts stated in the petition and exhibits, a writ of *habeas corpus* ought to be issued according to the prayer of the petition; to the second, that, on the same facts, the petitioners ought to be discharged; and to the third, that the military commission had not jurisdiction to try and sentence the petitioners in manner and form as in the petition and exhibits is stated.

Thus, may it please the Court, have I performed the part assigned me in the argument of these cases. The materials were abundant. I only fear that I may have wearied you with the recital or erred in the selection. I could not look into the pages of English law—I could not turn over the leaves of English literature—I could not listen to the orators and statesmen



of England, without remarking the uniform protest against martial usurpation, and the assertion of the undoubted right of every man, high or low, to be judged according to the known and general law, by a jury of his peers, before the judges of the land. And when I turned to the history, legal, political, and literary, of my own country—my own undivided and for ever indivisible country—I found the language of freedom intensified. Our fathers brought with them the liberties of Englishmen. Throughout the colonial history we find the colonists clinging, with immovable tenacity, to trial by jury, *Magna Charta*, the principle of representation, and the Petition of Right. They had won them in the fatherland in many a high debate and on many a bloody field; and they defended them here against the emissaries of the Crown of England and against the veteran troops of France. We, their children, thought we had superadded to the liberties of Englishmen the greater and better guarded liberties of Americans.

These great questions, than which greater never yet came before this most august of human tribunals, are now to receive their authoritative and last solution. Your judgment will live when all of us are dead. The robes which you wear will be worn by others, who will occupy your seats, in long succession, through, I trust, innumerable ages; but it will never fall to the lot of any to pronounce a judgment of greater consequence than this. It will stand when the statue, which with returning peace we have raised above the dome of the Capitol, shall have fallen from its pedestal, its sword broken, and its shield scattered in pieces; nay, when the dome itself, which, though uplifted into the air, seems immovable as the mountains, shall have crumbled; it will stand as long as that most imperishable thing of all, our mother-tongue, shall be spoken or read among men.

That judgment, I hope and I believe, will establish the liberty of the citizen on foundations never more to be shaken, and will cause the future historian of our greatest struggle to write that, great as were the victories of our war, they were equaled in renown by the victories of our peace.

## APPENDIX.

THE following authorities were referred to in connection with the argument in Milligan's case:

I. *Earl of Lancaster's Case*.—1 Blackstone, Com., 418; 1 Hale, Pleas of the Crown (Dogherty's ed., London, 1800), pp. 344, 499, 450; Hume, History of England, ch. 14, vol. 2, p. 159.

II. *Military Commissions of Charles I.*—Rymer's *Fœdera*, XVIII, 254, 763.

III. *Extracts from the Petition of Right*.—The Petition of Right (5 Statutes of the Realm, fol. 24).

IV. *English Acts suspending the Privilege of the Writ of Habeas Corpus*.—1 W. and M., St. ch. 7, 19; 7 and 8 W. 3, ch. 11; 6 Anne, ch. 15; 1 Geo. I, ch. 8, 30; 17 Geo. II, ch. 6; 19 Geo. II, ch. 1; 17 Geo. III, ch. 9; 34 Geo. III, ch. 54; 35 Geo. III, ch. 1; 38 Geo. III, ch. 36; 39 Geo. III, ch. 44; 39 and 40 Geo. III, ch. 32; 41 Geo. III, ch. 26; 57 Geo. III, ch. 3 and 55, p. 193; 11 and 12 Vict., ch. 35.

V. *Geoffroy's Case, in France*.—Court of Cassation, June 29, 1832 (24 Journal du Palais, p. 1,218, *et seq.*); *Supplément à la Répertoire du Journal du Palais* (1857), vol. 1, p. 707, Art. 50, 54, 55.

VI. *Debates in the Federal Convention, showing how the Provision as to the Habeas Corpus came into its Present Shape*.—1 Elliott's Deb., 145, 148, 149, 223; Draft of a Constitution, reported by the Committee of Five, August 6, 1787; *ib.*, 224, 229, 270, 295, 445; 5 *id.*, 446, 484, 530; Revised Draft of the Constitution, reported September 12, 1787, by the Committee of Revision, 1 Elliott's Deb., 298, 301, 304, 307, 5 *id.*, 535-553.

VII. *Debates in the State Conventions relative to the Habeas Corpus*.—Massachusetts, January 26, 1788, 2 Elliott's Deb., 108, 109; February 1, 1788, *ib.*, 187; New York, *ib.*, 406, 407; 1 Elliott's Deb., 328; *ib.*, 329, 330; Virginia, 3 Elliott's Deb., 102, 449, 461, 464.

VIII. *Instances in which the Privilege has been sustained, and how understood*.—Marshall, C. J., Ex. p., Bollman, 4 Cranch, 101; Taney, C. J., Ex. p., John Merriam, 9 Am. Law Reg. (1861), 536; 1 Tucker's Blackstone, App., 292; Story, Const., sec. 1,342, and notes 2 and 3; Rawle on the Constitution, 114; Smith's Comm., 364; Sedgwick's Stat. and Const. Law, 598.

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X. *Acts of Congress relating to Military Commissions and Courts-Martial*.—Act of July 22, 1861 (12 U. S. Stat., 270); Act of July 17, 1862 (12 U. S. Stat., 598); Act of March 3, 1863 (12 U. S. Stat., 736); Act of March 3, 1863 (12 U. S. Stat., 737); Act of July 2, 1864 (13 U. S. Stat., 356); Act of February 13, 1862 (13 U. S. Stat., 339, 340); Act of March 3, 1863, ch. 75, sec. 21 (12 U. S. Stat., 735); Articles of War (2 U. S. Stat., 367; 4 U. S. Stat., 417).

XI. *Proclamations and Orders of the President relating to Habeas Corpus.*—Proclamation of September 24, 1862; Lawrence's *Wheaton on International Law*, p. 522; Judge-Advocate Bingham's *Argument in Booth's Case*, p. 22; Proclamation of May 10, 1861 (13 U. S. Stat., App. No. 7, p. iv); Proclamation of September 15, 1863 (13 U. S. Stat., App. No. 5, p. iv); Proclamation of July 5, 1864 (13 U. S. Stat., App. No. 15, p. xii).

XII. *Johnson vs. Duncan, et al's Syndics*; 3 *Martin's La. Rep.*, 520.

XIII. *The Origin of the Suspension Act in the English Parliament.*—*Commons Journal*, vol. 10, pp. 38–40, 42, 43.

XIV. *Preamble of the Annual Mutiny Act.*—1 W. and M., ch. 5 (6 Statutes of the Realm, 55); 28 and 29 Vict., ch. 11.

XV. *Revolutionary Precedents.*—General Washington's Instructions; Congress of the Confederation, June 17, 1775; Fisher's "Trial of the Constitution," p. 223; Journal of Congress, August and September, 1777; Washington's Revolutionary Orders, selected from the Manuscript of John Whiting, Adjutant of the Second Massachusetts line, and edited by his Son, Henry Whiting, U. S. A.; Orders 1, 2, 17, 26, 36.

XVI. *Case of Missionary Smith.*—Mackintosh's Speech in Parliament, p. 734 (his works).

XVII. *Comparison between the Powers of the President of the United States and of the Governor of New York.*—*Federalist*, No. 69.

XVIII. *What is Martial Law?*—Wellington's Speeches, 733.

XIX. *Speech of Daniel Webster, in the House of Representatives, during the War of 1812.*—*Annals of Congress* (13th Cong.), vol. 1, p. 886.

XX. *Opinion of William Wirt.*—Attorney-General's Opinions, vol. 2, p. 192.

XXI. *What, in Contemplation of Law, is a Time of Peace.*—Coke upon Littleton, Lib. 3, sec. 412, "of Descents"; "Per Occupation en temps de guerre."

XXII. *Case of Theobald Wolfe Tone, in 1798.*—27 State Trials, p. 615.

XXIII. *Opinion of English Counsel on the Jamaica Outrages.*—Opinion of Edward James and J. Fitz-James Stephen, Temple, January 13, 1866.

XXIV. *English Law Magazine on Martial Law in Australia.*—November, 1861.

# CONSTITUTIONALITY OF TEST-OATHS.

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## THE CUMMINGS CASE.

1867.

THE Rev. Mr. Cummings, a priest of the Roman Catholic Church, was convicted in September, 1865, by the State Courts of Missouri, of the alleged crime of teaching and preaching without having taken the oath prescribed by the Constitution of the State, which oath required that the person taking it should affirm that he had not been in armed hostility to the Government of the United States or of the State of Missouri, and had not given aid and comfort to persons engaged in such hostility. The case of Mr. Garesche, a member of the Missouri bar, who was for a like reason refused the privilege of appearing in the courts as counsel, was argued at the same time. The Supreme Court of the United States decided that the requirement was unconstitutional, and ordered Mr. Cummings to be discharged, and Mr. Garesche to be allowed the exercise of his profession.

If the Court please :

These cases are brought here, from the Supreme Court of Missouri, by writ of error, under the twenty-fifth section of the Judiciary Act of 1789. Both relate to the test-oath imposed by the new Constitution of that State. In the former, Mr. Cummings, a Roman Catholic priest, was prosecuted and fined, and in the latter, Mr. Garesche, a member of the bar, was virtually disbarred, for acting or attempting to act in their respective professions, without taking the oath. In my argument of the cases I shall find it most convenient to myself, and, I doubt not, most satisfactory to the Court, to consider the case of Mr. Cummings first, and afterward that of Mr. Garesche; touching, in the latter, only those points in which it may be supposed to differ from the former. Mr. Cummings was convicted, in the Pike County Circuit Court, Missouri, of the crime of teaching and preaching as a priest and minister of the Catholic

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Church, without having taken the oath, and sentenced to pay a fine of five hundred dollars, and to be imprisoned until the fine should be paid.

The provisions of the Constitution of Missouri are as follows :

"**SEC. 8.** At any election held by the people under this Constitution, or in pursuance of any law of this State, or under any ordinance or by-law of any municipal corporation, no person shall be deemed a qualified voter who has ever been in armed hostility to the United States, or to the lawful authorities thereof, or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending, within their lines, money, goods, letters, or information; or has ever disloyally held communication with such enemies; or has ever advised or aided any person to enter the service of such enemies; or has ever, by act or word, manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority, or been in the service, of the so-called 'Confederate States of America,' or has ever left this State and gone within the lines of the armies of the so-called 'Confederate States of America' with the purpose of adhering to said States or armies; or has ever been a member of, or connected with any order, society, or organization, inimical to the Government of the United States, or to the government of this State; or has ever been engaged in guerrilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as 'bushwhacking'; or has ever knowingly and willingly harbored, aided, or countenanced any person so engaged; or has ever come into or left this State for the purpose of avoiding enrollment for, or draft into, the military service of the United States; or has ever, with a view to avoid enrollment in the militia of this State, or to escape the performance of duty therein, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or as a Southern sympathizer, or in any other terms indicating his disaffection to the Government of the United States in its contest with rebellion, or his sympathy with those engaged in such rebellion; or having ever voted at any election by the people of this State, or in any other of the United States, or in any of their Territories, or held office in this State, or in any other of the United States, or in any of their Territories, or under the United States shall thereafter have sought or received under claim of alienage, the protection of any foreign government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this State or in the Army of the United States; nor shall any

such person be capable of holding in this State any office of honor, trust, or profit under its authority; or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation. But the foregoing provisions in relation to acts done against the United States shall not apply to any person not a citizen thereof, who shall have committed such acts while in the service of some foreign country at war with the United States, and who has, since such acts, been naturalized, or may hereafter be naturalized, under the laws of the United States; and the oath of loyalty hereinafter prescribed, when taken by any such person, shall be considered as taken in such sense.

"Sec. 6. The oath to be taken as aforesaid shall be known as the oath of loyalty, and shall be in the following terms: 'I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof, as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the Government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.'

"Sec. 7. Within sixty days after this Constitution takes effect, every person in this State holding any office of honor, trust, or profit under the Constitution or laws thereof, or under any municipal corporation, or any of the other offices, positions, or trusts, mentioned in the third section of this article, shall take and subscribe the said oath. If any officer or person referred to in this section shall fail to comply with the requirements thereof, his office, position, or trust shall, *ipso facto*, become vacant, and the vacancy shall be filled according to the law governing the case.

"Sec. 9. No person shall assume the duties of any State, county, city, town, or other office, to which he may be appointed, otherwise than by a vote of the people; nor shall any person, after the expiration of sixty days after this Constitution takes effect, be permitted to practice as an attorney or counselor at law; nor, after that time, shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemn-

nize marriages, unless such person shall have first taken, subscribed, and filed said oath.

"SEC. 14. Whoever shall, after the times limited in the seventh and ninth sections of this article, hold or exercise any of the offices, positions, trusts, professions, or functions therein specified, without having taken, subscribed, and filed said oath of loyalty, shall, on conviction thereof, be punished by fine, not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both such fine and imprisonment; and whoever shall take said oath falsely, by swearing or by affirmation, shall, on conviction thereof, be adjudged guilty of perjury, and be punished by imprisonment in the penitentiary not less than two years."

Dividing this oath into all its separable parts, it will be found to contain eighty-six distinct affirmations or tests. It is both prospective and retrospective; that is to say, it speaks from the time when it is actually taken by each person, and relates to all that has gone before; so that, if taken by Mr. Cummings now, it will embrace all his past life, and, if taken five years hence, it will embrace not only all his life, that is now passed, but the five years from this time forward.

Altogether, it is a novelty in this country, and I believe it is a novelty in the world. I have searched in vain for anything in history so sweeping and severe.

The State of Missouri steps between the Christian flock and its pastor. He can not ascend the pulpit and preach to a devout congregation the resurrection of the dead and the life of the world to come; he can not teach the forgiveness of sins at the bedside of a dying penitent; he can not bless the bride at the altar, without calling God to witness that he is superior to all these tests.

The Supreme Court of Missouri, the highest tribunal known to the laws of that great Commonwealth, has affirmed the judgment of the Circuit Court, and thereby declared that there is nothing in the political system of that State to forbid the imposition of such a test. It is for you, Supreme Judges of all the land, to declare whether there is anything in the political system of the nation to forbid it.

My argument will first be directed to that part of the oath which affirms that the person taking it has never "*been in armed hostility to the United States, or to the lawful authorities thereof, or to the government of this State*"; . . . and has

never "*given aid, comfort, countenance, or support to persons engaged in any such hostility*"; . . . and has never "*been a member of, or connected with, any order, society, or organization inimical to the Government of the United States, or to the government of this State.*" If the imposition of this is repugnant to the Constitution or laws of the United States, the whole oath must fall; for all parts of it must stand or fall together. Mr. Cummings was convicted because he had not taken the oath as a whole. If there be any part of it which he was not bound to take, his conviction was illegal. The oath is not administered by portions, and there is no authority so to administer it.

THE FIRST POSITION that I take is, that this provision of the Constitution of Missouri is repugnant to the Constitution and laws of the United States, because it requires or countenances disloyalty to the United States.

Stripping the case now of everything not immediately pertaining to my first position, the oath required may be considered as if it contained only these words: "*I hereby declare, on oath, that I have never been in armed hostility to the government of the State of Missouri, nor given aid, comfort, countenance, or support to persons engaged in any such hostility, and have never been a member of, or connected with, any organization inimical to the government of this State.*"

This, instead of being an oath of loyalty, as it is called, is an OATH OF DISLOYALTY TO THE UNITED STATES.

What is the government of a State? Here is Johnson's definition of government:

"1. Form of a community with respect to the disposition of the supreme authority.

"2. An established state of legal authority.

"3. Administration of public affairs."

And here is Webster's:

"1. The act of governing; the exercise of authority; the administration of laws; control; direction; restraint; regulation: as, civil, church, or family *government*.

"2. The mode of governing; the system of polity in a state; the established form of law: as, a republican *government*.



"3. The right or power of governing ; authority.

"4. The person or persons authorized to govern or administer the laws ; the ruling power ; the administration : as, to be obedient to the *government* ; to rebel against the *government*.

"5. The body politic governed by one authority ; a commonwealth ; a state : as, the *governments* of Europe."

In written constitutions, the *State* or body politic is distinguished from the *government* of the State ; thus, in the Constitution of the United States it is declared that "the United States shall guarantee to every State in this Union a republican form of government," and treason is defined as against *the United States*, not against the *Government* of the United States. In the very oath now under consideration a distinction is made between "the United States" and "the lawful authorities thereof," and between "the United States" and "the Government of the United States," and between "the Union of the United States" and "the Government thereof." In the first Constitution of New York, 1777, the preamble recited that the usurpation of the King and Parliament of Great Britain on the rights and liberties of the American colonies "had reduced them to the necessity of introducing a government by congresses and committees, as temporary expedients," and also that the "government of this colony by congresses and committees was instituted while the former government under the crown of Great Britain existed in full force," and that it had been "recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government," etc.

These examples are sufficient to show that, when one was required to make oath that he had not been in armed hostility to the government of the State, something was understood different from the State itself. What was that something ? The governing authority. There may be a government *de facto* and a government *de jure*. The government of Missouri, in 1861, was both. The Governor, the Legislature, and the Judges were lawfully elected and installed. However unlawful may have been their intentions or their acts, their offices were lawfully held.

I insist, then, in the first place, that the government of Missouri has been in fact hostile to the United States, and that being in armed hostility to this hostile State government was an act of loyalty to the United States—an act not to be punished, but to be rewarded. On this point I am at liberty to refer to the public history of the country, as to a matter of which the Court takes judicial notice.

The Governor of Missouri, Claiborne F. Jackson, wielding the executive power of the State, was thoroughly disloyal. In answer to the President's call for troops, after the fall of Sumter, he said, "It is illegal, unconstitutional, revolutionary, inhuman, diabolical, and can not be complied with."

The Legislature was disloyal. An extra session, called by the Governor, was held on the 2d of May, 1861, at which twenty-one general laws were passed, all but two relating to anticipated military collision between the State and the Federal Government.

The first was entitled "An Act to provide for the organization, government, and support of the military forces of the State of Missouri." This provided for the organization of what was known as the "Missouri State Guard," and prescribed the following oath for volunteers:

"You, each and every one of you, do solemnly swear, or affirm (as the case may be), that you will bear true allegiance to the State of Missouri; and that you will serve her honestly and faithfully, against all her enemies, or opposers, whatever; that you will support the Constitution of the State of Missouri, and observe and obey the orders of the Governor of Missouri, and the orders of the officers appointed over you, while on duty, according to the rules and articles for the government of the Missouri State Guards; so help you God."

One of the sections of this act, 167, was as follows:

"It is hereby declared unlawful for any number of the inhabitants of this State to unite together in the semblance of an armed organization, without having been first regularly organized and mustered into the service of the State under the provisions of this act; and whenever it shall come to the knowledge of any officer or soldier of the Missouri State Guard that such an armed organization has been or is likely to be attempted, it shall be his duty to immediately notify the commanding officer of the district in which such organization has been, or is to be attempted, of the fact, and it shall be the duty of the commanding officer of such district to

immediately disarm the same; and to this end he shall have authority to use so much of the military force at his command as will attain that end; and all arms found in possession of such organization shall be confiscated to the State, and be seized and forwarded to the State Arsenal: *Provided*, That nothing in this section shall be so construed as to prevent the summoning a *posse comitatus*, by a sheriff or other civil officer, to enforce the execution of any civil process."

Another of the acts of this session of the Legislature was the following, passed May 10, 1861:

"An Act to authorize the Governor of the State of Missouri to suppress rebellion and repel invasion:

"*Whereas*, Information has been received that the city of St. Louis has been invaded by the citizens of other States, and a portion of the people of said city are in a state of rebellion against the laws of the State, whereby the lives and property of the good people of the State are endangered; therefore,

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"§ 1. That the Governor of the State of Missouri is hereby authorized to take such measures, as in his judgment he may deem necessary or proper, to repel such invasion or put down such rebellion.

"This act shall take effect from its passage."

On the morning of the day when this act was passed a collision actually occurred. The Governor had established a camp near St. Louis, called "Camp Jackson," which General (then Captain) Lyon, commanding for the United States, thought it necessary to capture. On marching thither, he addressed the following letter to the commanding officer of the camp:

"HEADQUARTERS U. S. TROOPS, ST. LOUIS (MO.), May 10, 1861.

"General D. M. FROST, commanding Camp Jackson.

"SIR: Your command is regarded as evidently hostile toward the United States. It is, for the most part, made up of those secessionists who have openly avowed their hostility to the General Government, and have been plotting at the seizure of its property and the overthrow of its authority.

"You are openly in communication with the so-called Southern Confederacy, which is now at war with the United States, and you are receiving at your camp, from the said Confederacy and under its flag, large supplies of the material of war, most of which is known to be the property of the United States. These extraordinary preparations plainly indicate none other than the well-known purpose of the Governor of this State, under whose orders you are acting, and whose purpose, recently communicated to the Legislature, has just been responded to by that body in the

most unparalleled legislation, having in direct view hostilities to the General Government and coöperation with its enemies.

"In view of these considerations, and of your failure to disperse, in obedience to the proclamation of the President, and of the eminent necessities of state policy and welfare, and the obligations imposed upon me by instructions from Washington, it is my duty to demand, and I do hereby demand of you, an immediate surrender of your command, with no other conditions than that all persons surrendering under this demand shall be humanely and kindly treated. Believing myself prepared to enforce this demand, one half hour's time before doing so will be allowed for compliance therewith.

"Very respectfully, your obedient servant,

"N. LYON, Captain 2d Infantry, commanding troops."

The history of the capture is thus given in Greeley's "American Conflict":

"But the Federal Arsenal at St. Louis had a garrison of several hundred regulars, under the command of Captain Nathaniel Lyon, who promptly made arrangements, not to destroy, but to protect and defend its stores of arms and munitions. During the night of the 25th of April the great bulk of them were quietly but rapidly transferred to a steamboat and removed to Alton, Illinois, whence they were mainly conveyed to Springfield, the capital of that State, foiling the secessionists, who were organizing a 'State Guard' in the vicinity with a view to their capture; who had for several days been eagerly and hopefully awaiting the right moment to secure these arms. Having thus sent away all that were not needed, Captain Lyon and Colonel Blair, on the morning of May 10th, suddenly surrounded the 'State Guard' at Camp Jackson, at the head of six thousand armed Unionists and an effective battery, and demanded their surrender, allowing half an hour for compliance with this peremptory request. General D. M. Frost, in command of the camp, being completely surprised, had no alternative but compliance. Twenty cannon, twelve hundred new rifles, several chests of muskets, large quantities of ammunition, the most of which had been recently received from the Baton Rouge Arsenal, now in Confederate hands, were among the spoils of victory."

Three days after this occurrence the Legislature passed the following act:

"An Act in relation to railroads and telegraphs in this State.

"Be it enacted by the General Assembly of the State of Missouri as follows:

"§ 1. The Governor of this State is hereby authorized and empowered, whenever in his opinion the security and welfare of the State may require it, to take possession, in the name of the State of Missouri, of any or all of the railroads or telegraph lines within the State, with all the offices and

appurtenances belonging thereto, and cause the same to be held and controlled by such persons as he may appoint for that purpose: *Provided*, That just compensation shall be made to the owners of such railroads and telegraph lines for all damages or claims arising out of the seizure or occupation of their property. This act shall take effect from and after its passage."

All this is matter of history. The loyal citizens of the State were obliged to array themselves against its government; they did so, they took up arms against it; they seized its camp and overthrew its forces. Had it not been for this act of hostility, the State might have been drawn into the abyss of secession. It was, therefore, an act which was not only lawful, but required of the citizen by his allegiance to the United States.

The Constitution and laws of the United States require allegiance and active support from every citizen, whatever may be the attitude of the State government. The difference between the Constitution and the Confederation consists in this chiefly, that under the Constitution, the United States act directly upon the citizen, and not upon the State. What the United States lawfully require must be done, though it be the seizure of the State capital. The State of Missouri could not subject the plaintiff in error to any loss or inconvenience, for giving, in 1861, a cup of coffee to the soldier who, under General Lyon, marched out to St. Louis to take Camp Jackson.

Passing from these *actual* occurrences, let us consider, in the second place, the tendency of this oath, in its relation to *possible* occurrences. It certainly is *possible* for the government of a State to be hostile to the United States. The governments of the eleven States lately in rebellion were so. If the Legislature of South Carolina were to pass a law excluding from the pulpit, and the offices of religious teachers, every person who has been, at any time during the late war, "connected with any organization inimical to the government" of South Carolina, that law would be held disloyal and unconstitutional. Suppose the Legislature of South Carolina were to go further, and enact that no person, white or black, should ever vote in that State, who, during the war, gave aid, comfort, or countenance to persons engaged in armed hostility to the government of South Carolina, would not every lawyer pronounce such a law utterly void?

If such an oath were required in Tennessee, the present President of the United States could not take it, and would be disqualified. If it were required in Virginia, more than one of our generals and admirals would be disqualified. And so of thousands of other citizens of the States lately in rebellion, who fought in the Union ranks, and opposed the governments of their own States.

There may be collisions between the Federal and the State governments, not breaking out, as the last has done, into flagrant war. A State government may attempt to resist the execution of a judgment of a Federal Court; and the President may be obliged to call out the militia to assist the Marshal. In such event, every man in the ranks will be in armed hostility to the government of the State. But the State can not make him suffer for it.

This results from the rule of the Constitution, that the instrument itself and the laws made in pursuance of it are the supreme law of the land; and whatever obstructs or impairs, or tends to obstruct or impair, their free and full operation is unconstitutional and void. This is the reason why State laws taxing United States securities have been held unconstitutional. The general rule is thus stated by Mr. Justice Story: "No State can control, or abridge, or interfere with the exercise of any authority under the national Government."

For the reasons, therefore, *first*, that the oath required does, in the part specified, make citizens of Missouri suffer for what they have already done; and, *second*, that it has a tendency to repel the citizens from active service to the United States, whenever such service may happen to be against the government of the State, and therefore requires them to remain neutral between the United States and the government of the State, a position which is not lawful for them to hold; the provision of the Constitution of Missouri which imposes this oath must be regarded as unconstitutional.

THE SECOND POSITION which I take is, that the provision imposing this oath, as a condition of continuing to preach or teach as a minister of the gospel, is repugnant to that part of the tenth section of the first article of the Constitution of the United

States which prohibits the States from passing "any bill of attainder" or "*ex post facto* law."

Here, again, I will take a particular part of the oath, and content myself with referring to so much as affirms that the person taking it has never, "by act or word, manifested his . . . sympathy with those . . . engaged in . . . carrying on rebellion against the United States." Making a simple sentence of this portion, it would read thus: *I declare on oath that I have never, by act or word, manifested my sympathy with those engaged in rebellion against the United States.* It may be assumed that, previous to the adoption of this Constitution, it had not been declared punishable or illegal to manifest, by act or word, sympathy with those who were drawn into the rebellion. It would be strange, indeed, if a minister of the gospel, whose sympathies are with all the children of men, the good and the sinful, the happy and the sorrowing, might not manifest such sympathy by an act of charity or a word of consolation. We will start, then, with the assumption that the act, which the plaintiff in error is to affirm that he has not done, was at that time lawful to be done.

Before I proceed to a more direct discussion of the constitutional question, I have a few words to say respecting test-oaths in general. They have been held odious in modern ages for two reasons: one, because they were inquisitorial; and the other, because they were used as instruments of proscription and cruelty. In both respects they are contrary to the spirit, at least, of our institutions, and are utterly indefensible except when applied to matters outside of the domain of rights, and are prospective in their operations. Whatever the people may give or withhold at will, they may have a constitutional right to burden with any condition they please. This is at once the origin and extent of the rule.

Mr. Webster, in his masterly way, explained his views on the subject to the Convention which met in 1820 to revise the Constitution of Massachusetts. When submitting a report respecting the oath which affirmed a belief in the Christian religion, he said:

"Two questions naturally present themselves: In the first place, have the people a right, if, in their judgment, the security of their government

and its due administration demand it, to require a declaration of belief in the Christian religion as a qualification or condition of office? On this question a majority of the committee held a decided opinion; they thought the people had such a right. By the fundamental principle of popular and elective governments, all office is in the free gift of the people. They may grant or they may withhold it at pleasure; and, if it be for them, and them only, to decide whether they will grant office, it is for them to decide also on what terms and with what conditions they will grant it. Nothing is more unfounded than the notion that any man has a right to an office. This must depend on the choice of others, and consequently upon the opinions of others, in relation to his fitness and qualification for office. No man can be said to have a right to that which others may withhold from him at pleasure. There are certain rights, no doubt, which the whole people—or the government as representing the whole people—owe to each individual in return for that obedience, and personal service, and proportionate contributions to the public burdens which each individual owes to the government. These rights are stated with sufficient accuracy in the tenth Article of the Bill of Rights in this Constitution: 'Each individual in society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to the standing laws.' There is no right of *office* enumerated; no right of governing others, or of beassing rule in the State. All bestowment of office remaining in the discretion of the people, they have, of course, a right to regulate by any rules which they may deem expedient. Hence, the people, by their Constitution, prescribe certain qualifications for office, respecting age, property, residence, etc. But if office, merely as such, were a right which each individual under the social compact was entitled to claim, all these qualifications would be indefensible. The acknowledged rights are not subject, and ought not to be subject, to any such limitation. The right of being protected in life, liberty, and estate is due to all, and can not be justly denied to any, whatever be their age, property, or residence in the State. These qualifications, then, can only be made requisite as qualifications for office on the ground that office is not what any man can demand as a matter of right, but rests in the confidence and good will of those who are to bestow it. In short, it seems to me too plain to be questioned, that the right of office is a matter of discretion and option, and can never be claimed by any man on the ground of obligation. It would seem to follow, then, that those who confer office may annex any such conditions to it as they think proper. If they prefer one man to another, they may act on that preference. If they regard certain personal qualifications, they may act accordingly, and ground of complaint is given to nobody. Between two candidates, otherwise equally qualified, the people, at an election, may decide in favor of one because he is a Christian, and against the other because he is not. They may repeat this preference at the next election on the same ground, and may continue it from year to year. Now, if the people may without injustice act upon this preference, and from a sole regard to this qualification,



and refuse in any instance to depart from it, they have an equally clear right to prescribe this qualification beforehand, as a rule for their future government. If they may do it, they may agree to do it. If they deem it necessary, they may say so beforehand. If the public will may require this qualification at every election as it occurs, the public will may declare itself beforehand, and make such qualification a standing requisite. That can not be an unjust rule the compliance with which in every case would be right. This qualification has nothing to do with any man's conscience. If he dislike the condition, he may decline the office ; in like manner as if he dislike the salary, the rank, or anything else which the law attaches to it."

Here we have the principle, according to Mr. Webster, which determines the rightfulness of the test, when applied to present belief or future acts.

When applied to past acts, another principle interposes its shield ; that is, that no person can justly be made to accuse himself. This is incorporated in the fifth amendment, in the following words: "No person . . . shall be compelled, in any criminal case, to be a witness against himself." And, though this prohibition is in terms applied to criminal cases, it can not be evaded by making that *civil in form* which is essentially *criminal in character*.

*Retrospective* test-oaths, that is, oaths that the persons taking them have not theretofore done certain things, are almost unknown. It seems to have been reserved to this age and this country to begin the use of them, as instruments of torture. I hold in my hand a little "Book of Oaths," published in London in 1689, purporting to contain the oaths, before that time, used in England ; but I do not find one which attempted to dive into a man's conscience, and extract thence the admission that once upon a time he sinned. I say I do not find a single oath of that kind. Perhaps I ought to except one—that of a man who, admitting that he had taken the King's venison, abjured the realm, but this is the only exception. England passed through all her changes from the Plantagenets to the sovereigns of the house of Hanover ; she swung to and fro in the throes of bloody and cruel revolutions ; she saw her kings beheaded or dethroned, dynasties taken up or laid aside, governments of Kings, Parliaments, and Lord Protectors, and desolating armies sweeping over her island, without ever, so far as I can discover, subjecting the vanquished to the inquisition of expurgatory oaths.

The oath of abjuration and supremacy, enacted in the reign of William and Mary, which afterward became so odious and oppressive, did not go backward. It was in these words :

"I, A. B., do truly and sincerely acknowledge, profess, testify, and declare in my Conscience, before God and the World, That our Sovereign Lord, King William, is lawfull and rightfull King of the Realm and of all other His Majesties' Dominions, and Countries thereunto belonging. And I do solemnly and sincerely declare, That I do believe in my Conscience that the Person pretended to be [the] Prince of Wales during the Life of the late King James, and since his Decease pretending to be and taking upon himself the Stile and Title of King of England, by the Name of James the Third, hath not any Right or Title whatsoever to the Crown of this Realm, or any other, the Dominions thereto belonging. And I do renounce, refuse, and abjure any Allegiance or Obedience to him.

"And I do swear that I will bear Faith and true Allegiance to His Majesty King William, and Him will defend to the utmost of my Power against all Traitorous Conspiracies and Attempts whatsoever, which shall be made against His Person, Crown, or Dignity. And I will do my best Endeavour to disclose and make known to His Majesty and His Successors, all Treasons and Traitorous Conspiracies, which I shall know to be against him or any of them. And I do faithfully promise to the utmost of my Power to support, maintain, and defend the Limitation and Succession of the Crown against him the said James, and all other Persons whatsoever, as the same is and stands limited (by an Act intituled, An Act declaring the Rights and Liberties of the Subject and settling the Succession of the Crown) to His Majesty during His Majesty's Life, and after His Majesty's Decease to the Princess Ann, of Denmark, and the Heirs of Her Body, being Protestants, and for default of such Issue to the Heirs of the Body of His Majesty being Protestants; And as the same by one other Act, intituled, An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject, is, and stands limited after the Decease of His Majesty and the Princess Ann, of Denmark, and for Default of Issue of the said Princess and of His Majesty respectively to the Princess Sophia Electress and Dutchess Dowager of Hanover, and the Heirs of Her Body, being Protestants.

"And all these things I do plainly and sincerely acknowledge and swear, according to these expres Words by me spoken, and according to the plain and common Sense and Understanding of the same Words, without any Equivocation, mental Evasion, or secret Reservation whatsoever. And I do make this Recognition, Acknowledgment, Abjuration, Renunciation, and Promise heartily, willingly, and truly, upon the true Faith of a Christian. So help me, God."

France has passed through revolutions worse even than England's. The imagination, blinded and bewildered by the apparent supremacy of Evil, personified and crowned it; and

for ever hereafter in the literature of the world the period of greatest misrule will be designated, with bad preëminence, as the Reign of Terror. Yet, in all the annals of that bloody period, I do not find a single instance of the retrospective expurgatory oath. Strange oaths there were, it is true. That of the Jacobins bound the takers "to defend, with their fortunes and their blood, every citizen who would have the courage to denounce the traitors of the country, or the conspirators against its liberties." The Legislative Assembly of August, 1792, decreed that "the citizens, in their primary assemblies, and the electors, in their electoral colleges, shall take an oath to maintain liberty and equality, or to die in their defense."

The revolutionary oath, adopted in May, 1793, was in these words: "I swear to be true to the republic, one and indivisible, to maintain, to the utmost of my power and of my abilities, holy liberty, holy equality, the safety of persons, and the respect for property, or to die at my post, in the protection of these sacred rights of men; moreover, I swear to live with my brethren in republican unity; finally, I swear to fulfill, with fidelity and courage, the particular duties which shall be intrusted to me." Those men, so impulsive and ferocious, not only refrained from imposing retroactive oaths, but they expressly declared in their constitution of June, 1793, that "no one shall be judged or punished, until after due hearing or legal notice given, and only in virtue of a law previous to the offense; the law which would punish an act prior to its passage, is tyranny; the retroactive effect given to a law would be a crime." And upon the return of the Bourbons, in 1814, a clause, as follows, was inserted in the constitutional charter: "All investigation of opinions and votes, up to the date of the restoration, is forbidden. The same forgetfulness is imposed on the tribunals and the citizens."

It has been said that the State of New York once entered upon this kind of retroactive legislation, in respect to the anti-dueling oath. But this is a mistake. An act was passed in 1803 "to prevent dueling," making it a high misdemeanor, punishable by disqualification from voting, or holding office. In November, 1816, another act was passed, entitled "An Act to suppress dueling," which declared that, after the 1st of July then next, every lawyer "on his admission should make oath

that, since the 1st of July, 1816, he had not violated the act to 'suppress dueling.' " As the "Act to suppress dueling" was not in existence till November, 1816, it should seem probable that 1816 was inserted by mistake for 1817. But, whether that was so or not, dueling had been a crime for thirteen years before the period to which the oath relates.

Ethical writers have regretted the frequency of oaths, and the tendency of modern legislation is to diminish their number. Promissory oaths, being intended to give a religious sanction to promises of future conduct, are administered to official persons on their entrance into office. Declaratory oaths, being administered to witnesses in judicial proceedings, are never to be made the instruments of self-accusation, when the result to the witness may be the same as if he were prosecuted in a criminal case.

Thus, it will be perceived that among the constitutional guarantees against the abuse of *Federal* power thrown around the American citizen are these three: 1. He can not be punished till judicially tried; 2. He can not be tried for an act innocent when committed; and, 3. When tried, he can not be made to bear witness against himself.

Two of these guarantees, and the last two, are set also against the abuse of *State* power. And it is now to the discussion of these, after what I have said of test-oaths in general, that I return.

Bills of attainder and *ex post facto* laws are described in Story's "Commentaries on the Constitution." Chief-Justice Marshall thus speaks of them in *Fletcher vs. Peck* :

"Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

" 'No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

"In this form the power of the Legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

"The State Legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The Legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment; why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This can not be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

The prohibition to pass an *ex post facto* law is, therefore, in the sense of the Constitution, a prohibition to pass any law which "renders an act punishable in a manner in which it was not punishable when it was committed." The question in the present case, therefore, becomes simply this: Is it a punishment to deprive a Christian minister of the liberty of preaching and teaching his faith? What is punishment? The infliction of pain or privation. To inflict the penalty of death is to inflict pain and deprive of life. To inflict the penalty of imprisonment is to deprive of liberty. To impose a fine is to deprive of property. To deprive of any natural right is also to punish. And so is it punishment to deprive of a privilege.

The modes of punishment have been different in different countries and ages. Among the Romans one mode was *capitis minutio*, in three grades, the first being loss of the privilege of membership of the family; the second, loss of citizenship; the third, loss of liberty. In France, at the present day, the punishments are death, imprisonment, hard labor, fine, transportation, banishment, deprivation or suspension of all civil rights,

or of some of them. Among these are enumerated the right of voting and of eligibility to office; the right of taking part in family councils, of being guardian or trustee; the right of bearing arms, and the right of teaching or being employed in a school or seminary of learning. In England, transportation to a penal colony is one of the punishments. Mr. Livingston, in the introduction to his "Criminal Code," says: "Forfeiture and suspension of certain civil and political rights are also punishments inflicted by the code. They are applied chiefly to misdemeanors in office, and to such offenses as show the want of the proper qualities to perform the duties which are required by them." And by the code itself the punishments are declared as follows: "The punishments and penalties to be incurred for offenses under this code, are—1. Pecuniary fines; 2. Simple imprisonment; 3. Imprisonment in close custody; 4. Deprivation of office; 5. The suspension of some one or more political or civil rights for a limited period; 6. The forfeiture of some one or more political or civil rights; 7. Imprisonment and hard labor for a limited time; 8. Imprisonment at hard labor for life." We may indeed safely conclude that depriving Mr. Cummings of the right or privilege, whichever it may be called, of preaching and teaching as a Christian minister, which he had theretofore enjoyed, and of acting as a professor, or teacher in a school or educational institution, was *in effect* a punishment.

It is not necessary to inquire whether it was *intended* as a punishment. If the Legislature may punish a citizen, by deprivation of office or place, on the ground that his continuing to hold it would be dangerous to the State, then every punishment, by deprivation of political or civil rights, is taken out of the category of prohibited legislation. Congress and the State Legislatures—for in this respect they lie under the same prohibition—can pass retroactive laws at will, depriving the citizen of everything but his life, liberty, and accumulated capital.

The imposition of this oath was, however, *intended* as a punishment. This is evident from its history and its circumstances. It is patent to all the world that the object of the exclusion was to affect the person, not the profession. It was adopted, not because the act mentioned in the oath showed

unfitness for the profession, but because the act was thought to deserve punishment, and there was no way of punishing the person who committed it but by excluding him from some of the rights and privileges of the citizen. Mr. Cummings may possibly at some moment during the last five years have manifested, by act or word, his sympathy with those engaged in carrying on rebellion against the United States; he may have given alms to the wounded rebel prisoners lying in our hospitals, or he may have spoken to them words of consolation; but the wit of man can not discover in all that any reason why he should not solemnize marriage or teach the Ten Commandments, nor can the credulity of man arrive at the belief that the Convention which devised this Constitution had any such notion.

There is a plain distinction between a regulation of police and the exclusion of particular persons. The former does not discriminate for personal delinquency, the latter does. One regulation may be designed to promote the general good, another may be designed to render uncomfortable the situation of particular persons. The butchers of this city may all be driven to exercise their calling at a certain distance from the capital, because the nearer exercise of it would be injurious to the public health; but if the City Council were to drive particular butchers away because they had been guilty of particular acts, it would then be punishing for delinquency. The distinction is analogous to that which has been taken in other cases.\*

Thus far I have not considered Mr. Cummings as by this means deprived of property. I have only considered him as deprived of some of his civil rights and privileges. But is not his interest in his profession *property*? He is described in the indictment as "a priest and minister of the Catholic religious persuasion, sect, and denomination." It is known to the Court as a matter of public history that the Catholic hierarchy are withdrawn from secular callings and supported by their Church. Mr. Cummings derives his livelihood from his profession. To deprive him from the exercises of one deprives him of the enjoyment of the other. This is property, because it is the means

\* See *Brown vs. Maryland*, 12 Wheat., 419; and *City of New York vs. Miln*, 11 Peters, 102.

of living. By the common law, church livings and presentations to benefices have been always regarded as property. The good will of a trade or business is property. It may be sold. Covenants not to set up rival establishments are of frequent occurrence. Tenant-rights or expectations of renewals of leases have been held to be property. We have all heard of Dr. Johnson's speech to the bidders assembled to buy Thrale's brewery, something in this wise: "Gentlemen, we sell you, not so many vats, etc., but the potentiality of acquiring wealth beyond the dreams of avarice." The punishment inflicted upon Mr. Cummings was, therefore, not only the deprivation of certain political and civil rights, but a forfeiture or deprivation of property.

We have, then, punishment inflicted on Mr. Cummings for an act not punishable when it was committed. And this was declared by Chief-Justice Marshall to be within the prohibition against passing an *ex post facto* law.

Let us turn now to the other prohibition, that against passing any "bill of attainder." This expression is generic, and includes not only legislative acts to punish for felonies, but every legislative act which inflicts punishment without a judicial trial. If the offense be less than felony, the act is usually called a bill of pains and penalties. The following is a specimen of an act of this sort, passed by the English Parliament, in the reign of Henry VI, against Jack Cade:

"At the Parliament holden at Reading, the sixth day of March the One and Thirtieth Year of the Reign of our Lord King Henry the Sixth, after the Conquest, the same Our Lord, the King, by the Advise and Assent of the Lords Spiritual and Temporal, and the Commons being in the said Parliament, and by Authority of the same Parliament hath [made] ordained and established, divers [Acts] and Statutes in the Manner and Form following:

"First—*Whereas*, The most abominable Tyrant, horrible, odious, and errant false Traitor, John Cade, calling and naming himself sometime Mortimer, sometime Captain of Kent, which Name, Fame, Acts, and [Feats] be to be removed out of the Speech and Mind of every faithful Christian Man, perpetually, falsely, and traitorously purposing, and imagining the perpetual Destruction of the King's said person, and final Subversion of this Realm, taking upon him Royal Power, and gathering to him the King's People in great Number, by false subtil imagined Language, seditiously made [a Stirring] Rebellion and Insurrection under Colour of Justice [for] Reformation of the Laws of the said King, robbing, slaying, and



spoiling great Part of his faithful People ; Our said Sovereign Lord the King, considering the Premises, with many other which were more odious to remember, by Advise and Assent of the Lords aforesaid, and at the Request of the said Commons, and by the Authority aforesaid, hath ordained and stablished, That the said John Cade, shall be reputed, had, named, and declared a false Traitor to our Sovereign Lord the King, and that all his Tyranny, Acts, [Feats] and false Opinions, shall be voided, abated, annulled, destroyed, and put out of Remembrance for ever."

The last bill of pains and penalties which appears to have been introduced into the British Parliament was the one directed against the wife of George IV. It proposed to deprive her of the title, rights, and privileges of Queen consort, and to dissolve the marriage between her and the King.

It is not at all necessary that the persons to be affected by a bill of attainder should be named in the bill. The attainder passed in the twenty-eighth year of Henry VIII against the Earl of Kildare,\* enacted that "all such persons which be, or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said late Earl etc., in his or their false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged, and convicted of high treason," and that "the same attainder, judgment, and conviction against the said comforters, abettors, partakers, confederates, and adherents, shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act." It is therefore certain that if Mr. Cummings had been *by name designated* in the Constitution of Missouri, and *thereby* declared to be deprived of his right to preach as a minister of religion, or to teach in a seminary of learning, for the reason that he had done some of the acts mentioned in the oath, such an attempt would have been in contravention of the prohibition against passing a bill of attainder ; and it is equally certain that if he had been thereunder *judicially convicted* for doing the same things, being not punishable when done, the conviction would have been in contravention of the other prohibition against passing an *ex post facto* law.

Does it make any difference that these results are effected

\* Chapter 18, A. D. 1536.

by means of an oath, or its tender and refusal? There is only this difference, that these means are more odious than the other. The legal result must be the same, if there is any force in the maxim that what can not be done directly can not be done indirectly; or as Coke has it, in the twenty-ninth chapter of his commentary upon Magna Charta, "Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud."

The constitutional prohibition was aimed at the *thing*, not at the *name*. The object was to protect every man's rights against that kind of legislation which seeks either to inflict a penalty without a trial, or to inflict a new penalty for an old matter. Of what avail will be the prohibition, if it can be evaded by changing a few forms? It is unquestionably beyond the competency of the State of Missouri, by any legislation, organic or statutory, to enact in so many words, that if Mr. Cummings on some occasion, *before* it was made punishable, manifested by an act or a word sympathy with the rebels, therefore he shall, *upon trial and conviction thereof*, be deprived of the right (or privilege), which he has long enjoyed, of preaching and teaching as a Christian minister. It must be equally incompetent to enact that all those Christian ministers, without naming them, who thus acted, shall be thus deprived. And this is because it is prohibited to the State to pass an *ex post facto* law. It is also unquestionably beyond the competency of the State to enact in so many words that because Mr. Cummings, on some occasion *after* it was made punishable, manifested such sympathy, therefore he shall, *without trial and conviction thereof*, be deprived of his profession. It must be equally incompetent to enact that all those Christian ministers who have thus acted shall be thus deprived. And this because it is prohibited to the State to pass a bill of attainder.

It does not help this kind of legislation, that its taking effect was made to depend on the neglect or refusal to take a prescribed oath. It does not help it, to declare that the omission to take the oath is deemed a confession of guilt. If Mr. Cummings had even admitted in the presence of the Convention his alleged complicity, that would not have dispensed with a judicial trial.

The legal positions which I have taken on the part of Mr.

Cummings may be thus restated as I leave his case. He is *punished by deprivation of his profession, for an act not punishable when it was committed*, and by a legislative instead of a judicial proceeding. If this is held to be constitutional because it is not done directly, but indirectly, through the tender and refusal of an oath, so contrived as to imply, if declined, a confession of having committed the act, then the prohibition may be evaded at pleasure. You can not imagine an instance of oppression that the Constitution was designed to prevent which may not be effected by this means. Suppose the case of a man tried for treason, and acquitted by a jury. The Legislature may nevertheless enact that if the person acquitted by a jury does not take an oath that he is innocent, he shall be deprived of political and civil rights or privileges. Suppose that the Legislature of New York were to pass an act disqualifying from preaching the gospel, or healing the sick, or practicing at the bar, all who during the last year were "connected with any organization inimical" to the *administration* of the State government. Such an act would of course be adjudged inconsistent with the Federal Constitution. But suppose, instead of passing the law in this form, it should be in the form of requiring an oath from every person desiring to preach the gospel, or to heal the sick, or practice at the bar, that he had not been connected with such an organization, would that make the case any better?

You can punish in two ways: you can charge with the alleged crime, and, proving it, punish for it; or you can require the party to purge himself on oath, and if he refuses, punish him by exclusion from a right, privilege, or employment.

Take a class of acts not now punishable as crimes, though immoral in themselves, as, for instance, breaches of trust, which in times of great monetary fluctuations become too frequent. Should the Legislature desire to punish them by a retroactive law, it would have only to enact that every man who does not take an oath that he has not committed a breach of trust shall be deprived of some of his rights, civil or political. Instances may be multiplied indefinitely, but enough has been said to illustrate the principle and to make it plain, if anything can be made so, that the reasoning which would justify this legislation

in the case of Mr. Cummings, would also open the door to the most flagrant invasions of private rights, and break down one of the great barriers of the Constitution.

I turn now to the case of Mr. Garesche. Most of what I have said is as applicable to his case as to that of Mr. Cummings. Indeed, it is all so, unless there is some difference between the rights of a lawyer and of a clergyman, in their respective professions.

Whether a lawyer holds an *office* has been much debated. The answer depends upon the definition given to the term. Certain it is that he holds a high and responsible position ; that he has confidential relations with the Courts and with his clients ; and that his authority to appear for suitors and assist the Courts in the determination of causes is not a mere indulgence, revocable at will. The ceremony of admission is designed to secure fitness in the advocate, and is not the dispensation of a favor. When once admitted, he has a right, valuable to himself, and servicable to others, which he may hold during good behavior ; *quamdiu se bene gesserit*. No other tenure is compatible with his rights and his duties—the rights he has acquired from laborious preparation for his high trust, and the duties which he owes to the tribunals and to the people.

These high functions, trusts, and relations have made the profession of the law an indispensable element in all free States. Cicero and Ulpian, Pothier and D'Agnessau, Coke, Bacon, and Mansfield, Marshall, Kent, Story, and Pinckney, were representatives of hosts of noble men. You, Judges, are alike representatives in our time ; you, who have been advanced to the highest seats on the bench, from the foremost ranks of the bar. It is for you to assert and vindicate our claims to hold our places here in your presence, not as a favor, but as a right, which may be forfeited for misbehavior, but can not be recalled at pleasure. Such a tenure best befits our duty to you and our service to our clients.

What is a right ? It is a *just claim* to a thing ; or, in other words, a claim to *that which the law gives or secures*. Natural rights, that is, the rights of a state of nature, are at the present day merged in civil rights ; so that now all rights must be regarded as either political or civil. These are generally set

forth in bills of rights, codes, and treatises on government. The Declaration of Independence declares that all men "are endowed by their Creator with certain inalienable rights; that among them are life, liberty, and the pursuit of happiness." The rights of property are, of course, among those which are alienable. The Bill of Rights of New York contains, among other things, the following: "No member of this State can be *disfranchised* or *deprived* of any of the *rights or privileges* secured to any citizen thereof, unless by the law of the land or the judgment of his peers." "No person can be subject for the same offense to be twice put in jeopardy of life or limb; nor can he be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor can private property be taken for public use, without just compensation."

The first Constitution of Massachusetts declared that "all men are born free and equal, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. . . . Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to the standing laws. . . . And no person shall be arrested, imprisoned, or despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the laws, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." The Constitution of Pennsylvania had an article—the ninth—beginning thus: "That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare: 1. That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness"; and ending thus: 26. "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall for ever

remain inviolate." Other State Constitutions contain substantially the same enumeration.

After reading these declarations of rights, I am tempted to exclaim, How have we forgotten the lessons of our forefathers!

A lawyer has acquired a knowledge of his profession, by laborious study; under the encouragement of standing laws. Proving himself qualified, he has, by a solemn judicial act, been invested with the right to represent clients before the tribunals. This right is valuable; it may be the source of a large income. That it is regarded as something more than an indulgence, revocable at will, is proved by the statutory provisions usually made for disbarring an unworthy advocate. Charges are to be exhibited against him; he is to be heard in his defense, and a judicial determination is to be had. Such provisions are common in the States; and, if they are not made by acts of Congress for the Courts of the United States, that is either because those Courts are supposed to have, under the Constitution, inherent power over the subject, or because it is known that they will exercise with judicial care the powers left with them by Congress.

Whenever the question has come before the Courts they have uniformly regarded the profession of a lawyer as clothed with rights.\*

But we are asked, "Can not those men be excluded from practice in the Courts, who are conspiring to destroy them?" The answer is easy: 1. They *can* be excluded. If a lawyer has been guilty of treason or conspiracy, arrest him, as you would arrest any other delinquent, and that will keep him away. 2. You can not examine him on oath to ascertain whether he is guilty, or assume that he is so if he refuses to swear to his innocence. 3. You must not punish one crime by committing another. If a lawyer has been guilty of an offense in law, let him be punished according to law; if he has not been thus guilty, he can not be lawfully punished.

\* It was so in Burr's case, 9 Wheat., 529; in Secombe's case, 19 How., 9; in Dorsey's case, 7 Porter, Ala., 294; in Wood's case, Hopk., 6; in Wallis's case, 10 Paige, 352, and 2 Den., 607; and in Cooper's case, 22 N. Y., 69. In Cohen vs. Wright, 22 Cal., the Court intimate an opinion that the profession of a lawyer can not be taken from him by the operation of a retrospective act.

We are then told with admirable composure, that our clients are not punished for the acts mentioned in the oath, or even for the refusal to take it, but for continuing the practice of their professions without the proper qualification. This is something like the argument of the man in the "Antiquary," to prove that there was no arrest for debt in Scotland; it was only an arrest for contempt of the king's supposed command to pay the debt. Really the argument, if it may be called such, can deceive nobody. The State does indeed punish the party for continuing the practice of his profession without a certain qualification; but that qualification is proof, by his own oath, of his innocence of some other thing, which other thing was not punishable when it took place. This amounts to punishing for the latter, and that too without a trial; and brings us back against both the constitutional prohibitions. Observe the process. An act is performed to-day, not forbidden by the laws; to-morrow it is convenient to punish it, but, to make the punishment sure, it must be effected without a trial. That is easy enough; the trial is avoided by assuming guilt, if not denied on oath, and the innocent act is punished, not by declaring its punishment in terms, but by declaring that it shall be a disqualification for something else, necessary or important to be done, and punishing for the latter. You can thus always reach every act, good or bad, which any man may have committed during his whole life, by debarring him from something necessary to his happiness, unless he does, what he can not do, swear that he has not committed it. By carrying out the theory to all its possible consequences, you may even take life; you have but to cut a man off from water or food, or something else essential to his existence, unless he first qualifies himself by an oath. If you can make a declaration of innocence the necessary qualification for the enjoyment of any of the rights or privileges of society, you need not resort to the slow and uncertain process of judicial trial; and if you can make this declaration of innocence reach acts legal as well as illegal, you can punish anybody for anything past, forbidden or not forbidden. To such an absurdity does the reasoning of our learned friends on the other side inevitably tend.

And here, if the Court please, I leave the cases of my clients.

These are important cases to them, and not to them only, but to the whole people of Missouri. That State was born in conflict. The dispute about her admission into the Union seemed likely to divide the Union. Slavery, which she then warmed in her bosom, stung her, viper that it was. The poison entered her vitals, and she has been purified from it only by blood and fire. An avenging Nemesis decreed that her deliverance should be effected through suffering, proportionate to her error.

She is now free. This oath, so vindictive and repulsive, is her last deformity. Let her be rid of that, and she will stand erect as well as free.

My clients, defeated at their own firesides, seek here protection. They know that to this chamber they can come for shelter, as fugitives of old sought refuge beside the altar. You stand the ultimate arbiters of constitutional rights; immovable, however tumultuous passions may surge and beat around you, the one stable and permanent element in the government of the country. Presidents appear and disappear like shadows. Senators and Representatives enter the doors of their chambers, and go out again, no one knows whither. You remain the ornament and defense of the Constitution—*decus et tutamen*.



# CONSTITUTIONALITY OF THE RECONSTRUCTION ACTS.

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## THE MCCARDLE CASE.

1868.

On the 12th of November, 1867, a writ of *habeas corpus* was issued from the Circuit Court of the United States for Mississippi, requiring the production of William H. McCardle, who was detained by the general commanding the District of Mississippi for trial by a military commission, under the alleged authority of the Reconstruction Acts, upon charges of "disturbance of the public peace; inciting to insurrection, disorder, and violence; libel; and impeding reconstruction." The Circuit Court adjudged that McCardle be remanded to the custody of the military authorities, and, pending his appeal to the United States Supreme Court, he was admitted to bail. One question before the Supreme Court was whether the appeal could be maintained under the Act of Congress of February 5, 1867, which provided that "from the final decision of any judge, justice, or court inferior to the Circuit Court an appeal may be taken to the Circuit Court of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States." Before the case was finally decided the Act of 1867 was repealed, and the Supreme Court dismissed the appeal, although the case had been argued upon the merits.

This case attracted great attention throughout the country, and was argued with great ability. Judge Sharkey and Robert J. Walker, of Mississippi, Charles O'Connor, of New York, and Jeremiah S. Black, of Pennsylvania, appeared with Mr. Field for McCardle; and Matthew H. Carpenter, of Wisconsin, Lyman Trumbull, of Illinois, and Henry Stanberry, the Attorney-General, appeared for the other side. It is stated that, after the argument, it became known that the case would be decided in McCardle's favor, unless the Act of 1867 were repealed. A postponement of the final decision was determined upon, against the following protest of Justices Grier and Field:

"This case was fully argued in the beginning of this month. It is a case that involves the liberty and rights not only of the appellant, but of millions of our fellow-citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of this Court. By the postponement

of the case, we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed upon us by the Constitution, and waited for legislation to interpose, to supersede our action and relieve us from responsibility. I am not willing to be a partaker, either of the eulogy or opprobrium that may follow, and can only say: '*Pudet hæc opprobria nobis, et dici potuisse; et non potuisse repelli.*' "

No further attempt was made to procure the judgment of the Court upon the constitutionality of the reconstruction acts, but McCardle was discharged.

May it please the Court:

If I were ambitious to connect my name with a great event in the constitutional history of my country, I should desire no better opportunity than that which this case affords. What is here transacted will remain in the memory of men long after the feet which are treading the halls of this Capitol have made their last journey, and the voices now so loud are for ever silent. Although the part borne by the bar in this transaction is inferior to yours, yet even they assume a portion of the responsibility, while the words that are to fall from you will stand for ever in the jurisprudence of the land.

In approaching the argument of so great a cause, it is of the first importance to exclude from it every extraneous or disturbing element. We should be lifted, if we may, above the strifes and passions of the hour into a serener air, overlooking a wider horizon. With the struggle for office, with the rise or fall of parties, with the policy of President or Congress, we have nothing to do. Within the walls of this chamber of justice we look only to the law and to the Constitution. That, however, does not prevent our taking care that the independence of the bench and of the bar be not menaced; or, if that happen, that the menace be repelled. I say this the rather because one of the gentlemen who argued against us saw fit to declare that it was the duty of counsel to admonish the Court. Admonition of what? Of impeachment, because you differ from Congress upon a constitutional question; of packing the Court at some future time; of enactment that two thirds or three fourths of the whole shall be necessary to decide, or the exclusion of the Court from its chamber? Admonition from whom? We know that the President has none to give; he disclaims it. Admonition from Congress? I have the highest respect for the members who perform the function of legislation for this country;

but they are representatives, all of them, of States or districts ; and when I reflect that from the great States of New York, New Jersey, Pennsylvania, Ohio, and California, they represent but a minority of the people, and that from ten States there are no representatives in either house ; and when I reflect, further, that this legislative department for nearly two years submitted to the suspension of the *habeas corpus* by the Executive alone ; that afterward, when it passed an act on the subject, it suffered the Secretaries of State and War to disregard and disobey its injunctions ; that it enacted, besides, "that any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order," a law which has scarce a parallel in history, save that of Denmark two centuries ago, which made a formal surrender to the crown of all right and function of government ; when I reflect on these things, the admonition, even were it otherwise proper, which it is not, appears to me shorn of all its force.

As a pendant to the admonition, we are told that this Court is not a coördinate department of the Government. Not a coördinate department ? Is it meant that there is no department coördinate with Congress ? This is the first time when it has been suggested here that the judicial department is not coördinate with either of the others. And certain I am, that in the great Convention, where sat the Conscript Fathers who made this Constitution, such an idea never entered. For I find that at the beginning, for the original plan, it was resolved, as the first resolution of the Convention, that "it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary." Turning to the comments of the founders of the Government, I find in the "Federalist," the forty-eighth and fifty-first numbers, this remarkable exposition, by Mr. Madison, written as if in the spirit of prophecy :

"I shall undertake in the next place to show, that unless these departments be so far connected and blended as to give to each a constitutional

control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained. . . .”

“It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. . . .”

“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . .”

“In a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power, and where the legislative power is exercised by an assembly which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes—it is against the enterprising ambition of this department that the people ought to indulge all their jealousy, and exhaust all their precautions. . . .”

“To what expedient, then, shall we finally resort for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied by so contriving the interior structure of the Government as that its several constituent parts may by their mutual relations be the means of keeping each other in their proper places. . . .”

Let me now turn to the case before the Court. The appellant, McCardle, a citizen of Mississippi, was there arrested in October, 1867, and brought before a military commission, which assumed to act under the authority of the United States, to be tried, for publishing in a newspaper, of which he is editor, criticisms upon military officers and advice to the electors not to vote, or how to vote upon public questions. This citizen was not in the army or navy, or connected with the military service, nor impressed with a military character. *And the question is, whether he was rightfully brought before that commission to answer for that act.* In other words, according to the Constitution and laws of this country, could a military commission, sitting in Mississippi, under Federal authority, bring to trial and judgment a civilian of that State, for words published concerning Federal military officers and the duty of the electors? The words may have been coarse and intemperate. That does not enter into the question. But it may be observed, in passing, that they were not coarser or more intemperate than other

words daily uttered concerning the highest civil officers of the country—the President, the Judges of this Court, and Members of Congress—not only by the public press, but in public bodies which call themselves respectable.

The act of this military commission is defended in this Court by counsel deputed by the Secretary of War. The defense rests upon certain acts of Congress, commonly known as the Military Reconstruction Acts. And the point to be decided is, therefore, whether these acts are, or are not, reconcilable with the supreme law of this land. If they are, our great forefathers made a charter of government, intended to last for all generations, of such a character that within eighty years from its adoption, that Federal body to which the States—originally sovereign and independent—surrendered a portion of their power, is able to take upon itself the whole government of a State and govern it by the army alone. Such is the question which, in the last resort, is brought before you, the supreme Judges of the land.

There are three of these Military Reconstruction Acts: one passed March 2, 1867; the second, a supplementary act, passed March 23, 1867, and a third, a further supplementary act, passed July 19, 1867. The first begins in this manner:

*"Whereas, No legal State governments or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and, whereas, it is necessary that peace and good order should be enforced in said States until loyal and republican State Governments can be legally established: Therefore,*

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter provided."*

After providing for the assignment of an officer of the army to the command of each district, the Act proceeds, in the third section, thus:

*"And be it further enacted, That it shall be the duty of each officer assigned as aforesaid, to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence; to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of and to try*

offenders; he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority with the exercise of military authority under this Act shall be null and void."

The supplementary Act of March 23, 1867, is not material to the present inquiry.

The first, second, and tenth sections of the supplementary Act of July 19, 1867, are as follows:

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is hereby declared to have been the true intent and meaning of the Act of the second day of March, one thousand eight hundred and sixty-seven, entitled 'An Act to provide for the more efficient government of the rebel States,' and of an Act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas were not legal State governments, and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.

"SECTION 2. *And be it further enacted,* That the commander of any district named in said Act shall have power, subject to the disapproval of the General of the Army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of said Act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding, or exercising, or professing to hold or exercise, any civil or military office or duty in such district, under any power, election, appointment, or authority derived from, or granted by, or claimed under any so-called State, or the government thereof, or any municipal or other division thereof; and, upon such suspension or removal, such commander, subject to the disapproval of the General as aforesaid, shall have power to provide, from time to time, for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise.

"SECTION 10. *And be it further enacted,* That no district commander or member of the Board of Registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States."

The first and principal question hinges on the preamble

to the original Act, and the enactments which I have just quoted.

There is the preamble, and here is the conclusion. I deny both. I deny that the preamble is true in a constitutional sense, or as a justification for assuming the government of a State; and I deny that, if the preamble were true in every one of its parts, it would justify this military government.

The propositions advanced against us are, in short: The preamble is true, and the enactments are justified by the preamble. We dispute both propositions. We say that the preamble is not true; but, if it were, that the conclusion would not follow.

It seems most convenient to reverse the order of the propositions, and to discuss the latter first; for, if the conclusion does not follow from the premises, the Court need hardly trouble itself about them. I shall, however, not only resist the conclusion, but, when I have done that, I shall examine and disprove the premises.

Let me first ask attention to the proposition, that because "no legal State Government, or adequate protection for life or property, now exists" in the State of Mississippi, therefore that State can be placed by Congress under absolute and universal martial rule. Where is the authority of the Government of the nation for taking upon itself the government of a State, however disordered and anarchical, and carrying on that government by the soldiery? We know that whatever power is possessed by Congress, or any other department of the Federal Government, is contained in a written Constitution. Within its few pages are comprised, either in express language or by necessary intendment, every power which it is *possible* for the Federal authorities of any kind to exercise under any circumstances. Show me then, I say, the power to erect this military government. You can not find it *expressed* in any one of the eighteen subdivisions of the eighth section of the first article—that section which contains the enumeration of the powers of Congress. If it is *implied* in any of them, tell me in which one. I can not find it.

Turn then to the fourth section of the fourth article, that which declares that "the United States shall guarantee to every State in the Union a republican form of government, and shall

protect each of them against invasion, and, on application of the Legislature, or the Executive when the Legislature can not be convened, against domestic violence."

Is a military government here sanctioned? Certainly it is not *expressed*. Is it *implied*? Supposing, for the sake of the argument, that the United States, uninvited by its Legislature or Executive, can go into a State for the purpose of repressing disorder or violence, or of overthrowing an existing State government on the ground that it is not republican, I deny that they can introduce a military government as the means to such an end. To avoid misapprehension, I carefully distinguish between the use of military power in aid of the civil, subordinate to it, and military government. The two systems are opposed to each other. In one case the civil power governs, in the other, the military. In one the military power is the servant of the civil, in the other, it is the master. My proposition is, that a military government can not be set up in the United States for any of the purposes mentioned; and the reason is this: *military government is prohibited by the Constitution*. Not disputing the proposition that Congress may pass all laws necessary or proper for carrying into effect any of the express powers conferred upon any department of the Government, and that Congress is, in general, the judge both of the necessity and the means, the proposition is to be taken with this qualification or limitation: that is, that the means must not be such as are prohibited by other parts of the Constitution. A lawful end, an end expressly authorized by the Constitution, can not be obtained by *prohibited means*.

This proposition should seem to be beyond dispute. Let us devote a few moments to its examination. The framers of the Government could not foresee all the exigencies which might arise in the future, and, therefore, after expressing the great ends for which the Government was formed, and the powers conferred upon it, they meant to leave the choice of the means generally to the discretion of Congress; but, fearing that in seasons of excitement and peril measures might be adopted not compatible with civil liberty, or consistent with the rights of the States or of the people, various express prohibitions were inserted in the original instrument, and their number was



greatly increased by the subsequent amendments. Thus, in the ninth section of the first article, the one immediately following the list of granted powers, is a series of prohibitions, seven in number, and among them that relating to the suspension of the privilege of *habeas corpus*, prohibiting it, "unless when, in cases of rebellion or invasion, the public safety may require it," and another relating to bills of attainder and *ex post facto* laws, prohibiting them altogether. Stopping for a moment to consider these clauses of the original instrument, before going into the amendments, we see clearly that, in the choice of means for carrying into execution any of its powers, Congress could not pass an act of attainder, or an *ex post facto* law, or, except in cases of rebellion or invasion, suspend the privilege of *habeas corpus*, however great might be the exigency or the peril, and though not only Congress, but the great majority of the country should think these means the most appropriate, the most sure, and the most speedy for meeting the exigency or avoiding the peril.

Passing then to the amendments, we find eleven articles, every one of which contains a prohibition of the use of particular means to obtain a permitted end. If the end be not permitted, the prohibition is unnecessary ; it is only when the end is lawful, and there is a choice of means, that the prohibition becomes effective. The manifest design was to prohibit the particular means enumerated in the amendments, however desirable might be the end. Among these prohibitions are the following : that Congress can not abridge the freedom of speech or of the press ; can not infringe the right of the people to keep and bear arms ; can not subject any person not in the military service to answer for infamous crime but upon the previous action of a grand jury ; can not bring an accused person to trial but by a jury ; and can not deprive any person of life, liberty, or property, without due process of law. Therefore, in the choice of means for obtaining an end, however good, Congress can not authorize the trial of any person, not impressed with a military character, for any infamous crime whatever, except by means of a grand jury first accusing, and a trial jury afterward deciding the accusation.

This prohibition is fatal to the military government of civil-

ians, wherever, whenever, and under whatever circumstances attempted. Such a government can not exist without military courts, military arrests, and military trials. The military government set up in Mississippi could not exist a day without them.

Thence it follows that, even if Congress had authority to take upon itself the government of a State, this government could not be a military one; and for this reason, if there were no other, the whole scheme of these military reconstruction statutes fails, and the statutes themselves are unconstitutional and void. If the statutes are void, all acts done under them are illegal.

To illustrate, suppose there were no legal State government in Mississippi, and no adequate protection for life or property, that the State were utterly disorganized; could Congress, for those reasons, pass an act of attainder? Is there any lawyer in this country who will stake his reputation in asserting it? Let us put the strongest possible case. Suppose that Jefferson Davis, the great leader of the rebellion, were in Mississippi to-day, creating anarchy and opposing the reconstruction of the South, so that unless he were got out of the way there could be no reconstruction of the State; I ask whether any lawyer will say that Congress could pass an act of this tenor, reciting that, whereas there is no State government in Mississippi, and total disorganization prevails; and whereas the continuance of this Union depends upon the reconstruction of the State: therefore, be it enacted, that Jefferson Davis be attainted, and that the Marshal be directed to take him forthwith and execute him? I suppose a case as strong as you may choose to put, and I defy any man to show that Congress has the power to pass such an act. Why not? Because our fathers, jealous of authority, knowing from their own experience and from the history of the world that power is liable to be abused, and that in the excitement of party, in the storm of war, the active departments of the government, Congress or the President, might be tempted to use means dangerous to freedom, have provided these safeguards, declaring that under no circumstances and for no end, however desirable, shall any such means be adopted.

It will be observed that I have argued thus far without referring to the case of *Milligan*, decided by this Court more than a year ago. I might have saved myself labor by citing that case in the beginning. But, if I have stated the argument in part anew, I nevertheless rely upon the authority of that great judgment—a judgment which has given the Court a new title to the respect of the world, and which will stand for ever as one of the bulwarks of constitutional freedom. We may not even yet know how much we owe to the Court for that decision. There was danger that the public conscience would become debauched by the spectacle of irregular and usurped power going on without punishment or rebuke. Some persons had come to believe that war, even as to non-combatants, overturned the institutions of peace. Many were disposed to palliate the wrong, if they could not justify it. A larger number had ceased to consider these usurpations, as they were in fact, great crimes. All this is happily changed. Your judgment recalled the people to a sense of the crimes which had been committed against them in the name of loyalty, and to the necessity of preserving at all times intact the defenses of constitutional liberty. Men no longer think that what is called martial law can be established by executive power, or applied to civil life. We agree with Goldwin Smith that, “of that phrase martial law, absurd and self-contradictory as it is, each part has a meaning. The term martial suspends the right of citizens to legal trial; the term law suspends the claim of an enemy to quarter and the other rights of civilized war. The whole compound is the fiend’s charter, and the public man who connives at its introduction, who fails in his day and in his place to resist it at whatever cost or hazard to himself, is a traitor to civilization and humanity, and, though official morality may applaud him at the time, his name will stand in history accursed and infamous for ever.”

It is true that the judgment in *Milligan’s* case did not *in terms* embrace the rebel States, for the discussions at the bar, as well as the opinions from the bench, appear to have been carefully guarded from their disturbing influence; but it is nevertheless to be observed that the principles declared are universal in their application. Four propositions were decided applicable

to the present case. One was that the Judges will of themselves take notice that where the courts are open there is peace in judgment of law. Another, that the guarantees in the Constitution of trial by jury, *habeas corpus*, etc., were made "for a state of war as well as a state of peace, and are equally binding upon rulers and people at all times and under all circumstances"—a sentence which deserves to be written in letters of gold and placed in the chambers of justice, as sentences of Magna Charta are written in the judicial halls of England. A third was, that a civilian could not be subjected to military trial; and a fourth, that "neither the President, nor Congress, nor the judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*."

I repeat, therefore, that if it were conceded that Congress could, in some possible circumstances, take upon itself the government of a State, it is certain that it could not govern by the army.

Before I proceed from this part of my argument to the next, which is to attack the premises upon which this military legislation is founded, I will make a short digression to consider the objections which have been urged by the learned counsel who last addressed you, against the jurisdiction of the Circuit Court. These objections are very brief, and can be very briefly answered. In fact, they have been answered, as I think, in the opinion pronounced by the Chief Justice a few days ago, upon the motion to dismiss, in which he said, with reference to the Circuit Courts, in his own emphatic language, that it was impossible to widen their jurisdiction.

The objections are, first, that the Act of March 2, 1867, under which the application for discharge was made to the Circuit Court, does not apply to any case to which the fourteenth section of the Judiciary Act of 1789 applies; and, second, that it does not apply to this case, because the offense charged against McCardle is a military one. The first objection arises out of a misconstruction of the Act of 1867. The Judiciary Act of 1789 authorized the writ of *habeas corpus* in favor of any person restrained of his liberty under the authority of the

United States; the Act of 1867 authorizes it in favor of any person restrained of his liberty in violation of the Constitution or laws of the United States. Here, it is quite true, both conditions exist: McCardle is restrained of his liberty under the authority of the United States, and he is restrained in violation of the Constitution. But, says my learned friend, because the Act of 1867 declares that the power which it gives is "in addition to the authority already conferred by law," therefore if the Circuit Court could have issued the writ under the Act of 1789, it could not issue it under the Act of 1867. Is not this, however, mistaking the form for the substance, and confounding the means with the end? The design of both acts is to release from unlawful custody, not to ordain the useless ceremony of issuing writs. The process might undoubtedly be issued in McCardle's case under the old law, but it would be ineffectual; it may also be issued under the new law, and will then be effectual. He is restrained of his liberty under the authority of the United States, but the restraint is also in violation of the Constitution of the United States. Hence his right to discharge, and to the writ as a means to an end.

But, says the counsel, his was a military offense, and a military offense was not within the act. A military offense! The statute says: "It shall be the duty of each officer, assigned as aforesaid, to protect all persons in their rights of person or property; to suppress insurrection, disorder, and violence; to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of, and try offenders; he shall have power to organize military commissions or tribunals for that purpose"; and therefore, argues my learned friend, every case which can be brought before a military commission is a military offense. Then all crimes are military offenses, because all criminals can be brought indiscriminately before "civil tribunals" or "military commissions." Even though an act be an offense against the penal code of Mississippi or of the United States, the offender can be brought before a military commission and tried by military rules. I have a great respect for the learned counsel, but really I can not argue this point. A mili-

tary offense is one committed by a military man, or which in some way affects the government of military men.

For these reasons I submit to you, as beyond dispute, that the Circuit Court had jurisdiction to hear McCardle's petition for a discharge, and that his case is rightfully here on appeal from its decision.

It is said, I know, that he is not accused of an infamous crime, and therefore that he is not within the purview of the prohibitions which I have mentioned. To this I answer, first, that if the offense with which he is charged be not infamous, he is still within all the prohibitions, except that contained in the fifth amendment; but, secondly, that he is accused of an infamous offense, because he can be subjected to infamous punishment. Under these reconstruction acts he can even be hanged by sentence of the military commission. There is no limit to its authority. He is therefore on trial for a capital crime. Besides, under the Act of Congress of July 17, 1862, inciting insurrection is made punishable by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars.

It is said again that Mississippi is not a State of the Union, and for that reason the prohibitions do not apply. Mississippi not a State? I shall discuss that question by and by. But granting now, for the sake of the argument, that it is not a State, it is yet within the United States, and this protecting power of the Constitution covers every foot of soil over which the flag of the country floats, from the Eastern to the Western ocean. It is felt in Massachusetts Bay and on the borders of the lakes; it is borne on the winds that sweep the Western prairies; you stand on the pinnacle of the Rocky Mountains, and still it hangs above you; it travels with you through the passes of the Sierra Nevada; it watches beside you in California; and, if you go thence northward toward the pole to far Alaska, there, even there, it flashes over you like the northern light.

In the case of *Dred Scott vs. Sanford* \* will be found the following language of the Chief Justice, delivering the opinion of the Court:

\* 19 Howard, 449.

"But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it can not, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It can not create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

"A reference to a few of the provisions of the Constitution will illustrate this proposition.

"For example: no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble and to petition the Government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

"So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory, without the consent of the owner, in time of peace, nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was

convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial government, as well as that owned by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizen of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government may attempt, under the plea of implied or incidental powers. And if Congress itself can not do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution."

Let it not be said of this language that the case of *Dred Scott* has been so much criticised as to weaken the authority of every part of it. This is the judgment of the Court, delivered by the Chief Justice, and concurred in by six of his brethren. The two dissenting opinions of Mr. Justice McLean and Mr. Justice Curtis use on this point similar language. The opinion of Mr. Justice McLean is on page 542, as follows: "No powers can be exercised which are prohibited in the Constitution or which are contrary to its spirit; so that whether the object may be the protection of the persons and property of purchasers of the public lands or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all Federal powers. Congress has no right to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the government of a Territory, to some extent the combined powers of the Federal and State governments are necessarily exercised."

The opinion of Mr. Justice Curtis, on page 614, referring to the clause about the territory of the country, says: "If, then, this clause does contain a power to legislate respecting the ter-



ritory, what are the limits of that power? To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions of Congress not to do certain things; that, in the exercise of legislative powers, it can not pass an *ex post facto* law or bill of attainder, and so on in respect to the other prohibitions contained in the Constitution."

In the opinion of Mr. Justice Nelson there is no dissent, although he confined himself to a view of the case which did not make it necessary to enter into this discussion.

I have, therefore, the opinion of every member of the Court against the existence of the power upon which the whole argument of the defendants rests. Congress, though it had the right to do in Mississippi everything that it could do if the country had been gained from Spain yesterday, or from the most unlimited government on earth, yet could not govern it by the army. And, as I have already said, even in the new territory, just purchased from that vast empire which has no constitution, but an autocrat legislating according to his will alone, and we have succeeded that government—even in that territory, if there be any vitality in our Constitution, Congress can not pass a law making the people subject to a military government. If that be so, is there not an end to this argument?

A parallel argument is contained in the case of *Houston vs. Moore*, a case to which the gentlemen referred. There the question was, whether a citizen of Pennsylvania, being ordered to rendezvous in pursuance of the direction of the President and by order of the Governor, refusing to attend, could be brought before a court-martial. The court-martial was held under the authority of the State of Pennsylvania. And, though the judgment is not relevant to this case, I refer to it for the purpose of showing that, in the dissenting opinion of Mr. Chief-Justice Story, he declared that, if a person summoned to the rendezvous could not be considered as in the service of the United States, he could not be tried except by a jury: \*

"The fourth section of the Act of 1795 makes the militia employed in the service of the United States subject to the rules and regulations of war; and those include capital punish-

\* 5 Wheat., 62.

ment by court-martial. Yet one of the amendments (Article V) to the Constitution prohibits such punishment, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service."

In short, there does not appear to be a dissenting opinion anywhere from the doctrine that a trial for crime of a person in civil life can only be by jury; and when it is for an infamous crime it can only be on the accusation of a grand jury. That binds the United States and all its departments conjoined. For, let it be understood that the Government of the United States means all the departments, and not one. Congress is not the Government, any more than this Court. But neither the whole Government of the United States nor any department of it can, by any law or act possible under the Constitution, subject a single citizen not in the military service, however high or however low, of whatever race or previous condition, to a trial for crime except by a jury of his peers. That being so, the whole scheme of the reconstruction acts falls to the ground. Here is a military government, resting upon military courts, and enforced by military executions. Congress has not chosen to intervene except by the army; its judges are men with epaulets; its sheriffs are soldiers with bayonets; and its scaffold is the greensward, with a platoon paraded.

This is the first part of my argument, and here, as I think, the whole argument might end; for if military government be a thing prohibited by the Constitution, we need go no further, nor trouble ourselves to inquire whether Congress has judged rightly in its reasons for intervention. The question is, whether McCardle, being a citizen of Mississippi, under the dominion of the United States, regarding Mississippi either as a State or as a Territory, can be subjected, under the authority of the Government of the United States, to a military trial, which involves his imprisonment or his life, no matter under what pretense or for what end. It is the particular kind of intervention, that is to say, intervention by military power, that I have been objecting to; and if I have shown that to be inadmissible and unconstitutional, it matters little whether the reasons for inter-

vention put forth in the preamble be sufficient or insufficient, or whether any other reasons have been, or could be, advanced for the interference of Congress in the government of Mississippi.

But I will now proceed a step further, and supposing, for the sake of the argument, that a military government is not a prohibited, but a rightful, constitutional means of intervention, I submit that the preamble furnishes no reason for any kind of intervention whatever, and this for two reasons: first, because it is not true, in a constitutional sense; and, second, because, if true, it is not a constitutional reason for intervention.

It is not true in a constitutional sense. Of course, I am not going into any question of personal veracity, nor into questions of fact, except such as the Court may take notice of judicially. The preamble asserts as facts, first, that there is no legal State government in Mississippi; and, second, that there is no adequate protection for life or property. These two asserted facts are separable and separately stated. There may be a legal State government, though that government may not fulfill, and may not be able to fulfill, all its duties for the protection of life and property. It is most convenient to consider these assertions separately.

Was there, or was there not, on the 2d of March, 1867, a *legal State government* in Mississippi? This inquiry involves another, antecedent to everything else, which is, whether the declaration of Congress is conclusive upon this Court, or, in other words, whether you are at liberty, after this declaration, to make for yourselves inquiry on the subject, or whether you must accept the declaration as conclusive, whatever may be your own knowledge or information. This question may perhaps best be answered by supposing a case. Suppose an act of Congress passed to-morrow, with a similar preamble, concerning the State of Massachusetts, would you accept it as absolute verity? If it declared that, whereas no legal State government exists in Massachusetts, therefore it be made a military district, and subject to the military power of the United States, just as Mississippi is made subject by the act in question, and the commanding General of the district were to seize the an-

cient State-House and Fanenil Hall, and the editors of the Boston newspapers were to be arrested and tried by military commissions for protesting against these violations, would you be obliged to hold that Massachusetts has no legal State government? Would you tell her that, though you do not see why she has not a legal State government, Congress has decided otherwise, and that is sufficient for you? I am supposing an extreme case; but an extreme case is a good test of a universal principle. If, as a principle universal in its application, the declaration of Congress is conclusive upon the other departments of the Government, then, in the case supposed of Massachusetts, it would prevail. If the principle is not universal, then there are cases in which this Court could inquire for itself, notwithstanding the declaration of Congress.

Is it true that, under this Government of ours, it is competent for Congress to declare that a State in this Union, the State of Massachusetts, has not a legal government, and therefore can be governed as a Territory? I deny it altogether. Where is the authority of Congress to declare whether a State has a legal or illegal government? I am not now discussing the question whether it is or is not republican. I repeat, where does Congress get the power to declare whether or not a State has a legal government? Take my State. Has Congress the power to say she has not a legal government? What do you mean by "legal"? Legal, according to what law?—Federal law, or State law?—military law, or civil law? For legal means, according to some law. Mr. Justice Nelson knows that the Constitution of New York has been changed several times, he himself having been a member of two of the Constitutional Conventions that made those changes; and he will remember that the opinion of the Supreme Court of the State was taken on the question whether the Convention to frame the present Constitution was constitutionally called, and they decided it was not, because the Convention was not called in the mode provided by the former Constitution of 1821.

Now, I ask my friends, any of them, has Congress the power to declare that my State has not a legal State government? Everybody will say no. Congress has no more power to come into New York and tell us that we have framed a Con-

stitution contrary to our previous Constitution, than to declare that the first government of New York was a void government. And if they should presume to come to us in that way, I think they will get an answer which will be quite sufficient. Let me tell them that New York chooses to frame her government in her own way, and will alter it as she pleases, subject only to the provision that it shall not be anti-republican in form; and, until that question arises, the Congress of the United States can have nothing to do with us any more than we can have to do with them.

The true rule I apprehend to be this: the Court will take judicial notice of the fact of an existing government in every State of the Union; such a government will be presumed to be legal till it is shown to be illegal; the declaration of Congress may be one of the sources of evidence which enter into the case, but not the conclusive or the only one. If there be two rival governments in a State, Congress may have the right to decide between them, and certainly must decide which is to send representatives to Congress, and that decision so far will be binding; but that is a very different thing from asserting that no government whatever exists, or that an existing government is *de facto*, and not *de jure*. The authority to *declare* a fact is only coextensive with the right to *decide* it; or, in other words, the declaration has no force, except as a decision. This, therefore, is the question: Has Congress authority to decide that *the existing government* of Massachusetts, or of any other State, is not a *legal* government? To this there should seem to be but one answer. No power is given Congress to interfere with the government of the States, any more than power is given the States to interfere with the government of the United States, except in this one respect, that the United States shall guarantee to each State a republican form of government. But this preamble does not deny that Mississippi has a government, republican in form. That she has a government is stated more than once in these Acts of Congress: it is there called an existing government; and, while it is pronounced not to be *legal*, it is nowhere pronounced not to be *republican*.

Having shown, as I trust, that the declaration of Congress is not conclusive upon this Court in respect to the existence of

a *legal* State government, little need be said respecting the conclusiveness of the declaration that there is no adequate protection for life or property. It is not for Congress to decide whether New York fulfills her duty to her citizens of protection for their lives and property; and, therefore, the declaration of Congress on that subject, in respect to New York or Mississippi, has no force whatever.

Now, laying aside the declaration of Congress contained in this preamble as of no constitutional force, though entitled to great respect because coming from one of the departments of the Government—laying that aside as not authoritative, I ask you to consider for yourselves whether or not the government of Mississippi was a legal government on the 2d of March, 1867. First, let us see what evidence these reconstruction acts themselves furnish. Though the original act declares that there is no legal State government in Mississippi, yet it provides, in the third section, that the military commander may allow the local civil tribunals to take effect. There is a government, then, as matter of fact. “And all interference, under color of State authority, with the exercise of military authority under this act shall be null and void.” There is some State authority, then. And in another section it is provided, that the citizens may have provisional governments only until they shall be entitled to representation. There is, then, a provisional government.

The supplementary Act of July 19, 1867, is still more explicit. The first section of that act speaks of “the governments then existing in the rebel States of Virginia, North Carolina, etc., as not legal State governments.” They were existing governments, be it understood. There is no doubt about that. They were *de facto* governments of the rebel States. The State of Mississippi had at the time a *de facto* government, which was exercising all the functions of government. Here—and this is additional and conclusive evidence—here are its statutes and here are its reports. This [holding up the volume] is but one of the two volumes of the reports of the highest Court of Mississippi during the time of the rebellion, excepting the time when the State was occupied by the Federal army, which forbade the Courts to assemble. And it may not be out

of place to say that in this, the last volume, is a decision upon the question whether they have a legal government—that is to say, whether the government adopted under the provisional Governor is a legal State government. Now, if, according to the doctrine of the case of *Luther vs. Borden*, you are to follow the decisions of the highest Court in the State as to the legality of their own government, then the decision of the highest Court in Mississippi is conclusive upon the action of this Court. Indeed, it is impossible to shut our eyes to the fact that, however censurable and criminal may have been the conduct of the Legislatures of the rebel States during the rebellion, there were, nevertheless, established governments during all the time, carrying on their operations with regularity.

Let me turn aside for a moment to consider this case of *Luther vs. Borden*, about which so much has been said, to show that, so far from being an authority against us, it is an authority in our favor.

The contest in that case was between two rival parties, each claiming to have the lawful government of the State. The contesting party claimed that its government had been adopted by the vote of the whole people, exercising for the first time the elective franchise; the party in possession, having admitted to the exercise of the franchise only a part of the people, rested upon that part for its authority; and the Judges were asked to decide that the government of the contestants was the true one, on the ground that it had received the sanction of the whole people.

By whom was the martial law mentioned in that case established? By the State of Rhode Island. Under the charter of Charles II the Legislature of that State had no limitation whatever; it could exercise its powers in a legislative, executive, and judicial capacity untrammelled, and the case has no application to the question whether Congress can establish martial law. The Court, by Chief-Justice Taney, decided that “the question, which of the governments was the legitimate one—viz., the Charter government, or the government established by the voluntary Convention—had not heretofore been regarded as a judicial one in any of the Courts”; that “the Courts of Rhode Island had decided in favor of the validity of the Charter gov-

ernment, and the Court of the United States adopted and followed the decisions of the State Courts in questions which concern merely the Constitution and laws of the State." Here is language so very pertinent to the present inquiry, that I will ask your attention to it particularly: "The fourth section of the fourth article of the Constitution," says the Chief Justice, "provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and, on the application of the Legislature or of the Executive (when the Legislature can not be convened), against domestic violence. Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." So that all that the Government of the United States, according to this case, can decide, is, as between two contesting governments, which is the established one.

And again, "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the Courts are bound to take notice of its decision, and to follow it."

The Congress is to decide what? Not that the State has not a legal State government, but to decide which is the established government of the State. It must decide what government is established, before it can decide whether it is republican or not. Now, see the argument that is pressed here: if Congress goes on with its reconstruction scheme, and there is set up another government in Mississippi, it can decide between the new government and the present one; therefore Congress can set up the new government. Was there ever a claim of power more unfounded? Because you have the right to decide between contesting governments, therefore, when there is only



one existing, you can set up another to contest with the first, and decide between the two! That is the whole of the argument.

Whether there is "*adequate* protection for life and property" in the State of Mississippi I do not know, as I do not know what is meant by *adequate* protection. According to European ideas, there is not "*adequate* protection for life or property" in some of the most loyal States of this Union. Should we, ourselves, say that there was adequate protection for life or property in the anti-rent districts of New York for the ten years between 1840 and 1850? Is there now adequate protection for life or property in the mining districts of Pennsylvania? How is it in the new settlements? Is it meant by adequate protection that crime is punished with celerity, certainty, firmness, and impartiality? If that be the measure of adequate protection, and Congress may interfere for the want of it, I fear they will have their hands full.

Having thus shown that neither part of the preamble is true in a constitutional sense, I add that, if both parts of it were true, they would not furnish a constitutional reason for assuming, even by civil officers of the United States, the civil administration of Mississippi. What I have to say in support of this negative proposition will be given more at length hereafter, as I proceed with my argument, and I will content myself here with observing that the States are, both by the letter and the spirit of the Federal compact, exempt from all Federal control or interference, except in pursuance of the Constitution, and that nowhere, expressly or by implication, is power given to assume the government of a State, for either or both of the causes set forth in this preamble.

Thus far, if the Court please, I have gone on the path which I had marked out for myself at the commencement, in considering whether the preamble of the original military reconstruction act is true in a constitutional sense, and whether, if it be true, it justifies the act; and I flatter myself that I have shown that, whether the preamble be true or not, it does not justify this intervention for the government of Mississippi by military power; and, in the second place, going back to the preamble, that it is not true in a constitutional sense, and,

if true, would not justify assumption of the civil administration.

But my learned friends go further and suggest other reasons, as they suppose, for these military governments. Now, I ask, in the first place, is the citizen permitted to go beyond an Act of Congress to find reasons for the act? Congress has said in the act itself that, whereas no legal State governments exist, and there is no adequate protection for life or property, therefore be it enacted, etc. Confining myself to this, I say that, standing alone, the preamble does not justify this act. My learned friends have departed from this preamble, and say, virtually, that it does not state half the case; that there are other reasons which justify the act.

To these reasons I must ask your attention. First, I will consider some of those which are given in debate, though not specially urged by the other side. I purpose, therefore, to consider the reasons generally given for these military acts, and then the reasons given by the counsel who have argued the case.

Four reasons have been most insisted upon in political debate: one, that Congress is the sole judge of what is a republican form of government, and when it adjudges the government of a State not to be republican, it may force a military government upon it; the second, that the rebel States were conquered, and, being so, may be governed by the same military force which conquered them, so long as Congress sees fit to continue such government; the third, that by the rebellion the government and people of the Southern States forfeited all their rights; and the fourth, that Congress may now govern the rebel States, in the exercise of belligerent rights. Each of these reasons will be considered by itself, in the order in which I have stated them.

*First.* The United States are to guarantee to each State a republican form of government.

What does this mean? To guarantee, in its ordinary sense, means to warrant something already existing, the performance of an existing contract, the continuance of an existing state of things. The first treaty made between this Government and France, negotiated by Franklin, provided that the United

States should guarantee to France the possession of her West India Islands, and that France should guarantee to us the possession of our independence. The guarantee of the Constitution here is the guarantee of an existing form of republican government—that is to say, of a form of republican government, the same being now in existence—and no more justifies the claim to intervene in the government of a State, for the purpose of reconstruction, than for the purpose of creating an emperor.

Under color of this power, can the Federal authorities destroy existing State authorities? Our construction is the only one compatible with the public safety. To give the Federal Government the unlimited power of destroying any State government upon the allegation that it is not republican, is to give to the central authority a control over the local authorities greater than was ever dreamed of before, and is to make way for a consolidation fatal to the rights of the States and the liberties of the people.

The history and contemporaneous exposition of this clause of the Constitution will show that it has no such meaning as the other side claim for it.

The subject was first brought before the Convention which framed the Constitution by Mr. Randolph, who proposed this form: "Resolved, that a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State."\* Afterward, "alterations having been made in the resolution, making it read, 'That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States,' the whole was agreed to, *nem. con.*"†

On a subsequent day, after considerable debate, Mr. Wilson moved, as a better expression of the idea, "that a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence." This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and, on the question for agreeing to Mr. Wilson's motion, it passed, *nem. con.*‡

\* 2 Madison Papers, 784.

† Ibid., 843.

‡ Ibid., 1139.

The language was afterward changed to the form which it now bears in the Constitution.

In the forty-third number of the "Federalist" is the following exposition, written by Mr. Hamilton :

"In a confederacy founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to *defend the system against aristocratic or monarchical innovations*. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government, under which the compact was entered into, should be *substantially* maintained.

"But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. 'As the Confederate Republic of Germany,' says Montesquieu, 'consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland.' 'Greece was undone,' he adds, 'as soon as the King of Macedon obtained a seat among the Amphictyona.' In the latter case, no doubt the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered that if the General Government should interpose by virtue of this constitutional authority it will be, of course, bound to pursue the authority. But the authority extends no further than to a *guarantee* of a republican form of government, which supposes a preëxisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms they have a right to do so, and to claim the Federal guarantee for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

The purpose of this guarantee of republican government was, therefore, to protect the States against "*aristocratic or monarchical innovations*." Who would have thought that in

less than eighty years this clause would be invoked as authority for forcing upon the States the most radical *innovations* in the opposite direction?

It is not for me in this place to say whether I think these innovations good or bad, nor is my opinion of any importance. If it depended upon me, and so far as I could constitutionally act, I would make every human being equal before the law. But I would not break the Constitution of my country for any innovations whatsoever.

Other forms of government, where there are different orders in the state, may be kept up by a balance of power, each struggling to prevent the preponderance of the other. But a republican government in a vast country is an impossibility without a written constitution. An instrument which is not kept inviolate is so far not a constitution. The choice for us, if we are to maintain a united government in this country, is between a written constitution, sacredly kept, preserved inviolate against all attacks, and a monarchical government. History has taught us nothing if it does not teach us that we can not maintain a consolidated government, on this continent, but by an emperor or a king; and that no other government can exist than a consolidated one, except under a written constitution. Therefore, whoever maintains the integrity of this Constitution sacred and inviolable against all opposers, maintains for himself and his posterity the freedom and unity of his country.

*Secondly*, we are told that we may govern the Southern States by the right of conquest. This right of conquest is the ground upon which the first counsel placed himself. The right of war is the ground upon which the last placed himself. "We have conquered the people," says the first. "It is well for them to know what is the temper of the North," he says in conclusion. "They are conquered and we are the conquerors, and we will give them such a government as we choose." Is this argument a sound one? How have we conquered the Southern States? In the sense in which the word conquest is used in this argument we have conquered the rebel armies, thanks be to God, and there is not a hostile force marshaled, there is not a hostile hand raised against us, between the two oceans. But does that operate to transfer the sovereignty from the con-

quered to the conqueror? Is the conquered sovereign displaced, and the conquering sovereign seated in his stead? Mississippi was a sovereign before, in a qualified sense. The United States were sovereign before, in a qualified sense also. But when the United States overcame the rebel armies, did they succeed to the sovereignty of Mississippi?

The suppression, by the former, of the rebel forces of the latter, was entirely consistent with the relations which previously existed between the two sovereigns: neither the war nor the victory changed the double allegiance of the citizen; one to his State and the other to his nation.

The laws of conquest have no application to a civil war. When a rebellion is subdued, the sovereign is restored to the exercise of his ancient rights. If a county of New York is declared to be in a state of insurrection, force is applied to put the insurrection down; and, when that is done, the law resumes its sway. The legal relations of the county to the State are not permanently changed, though their operations may have been suspended for the time being. By the laws of war between sovereign and independent States, when one has taken possession of the other, the will of the conqueror becomes the law, because his only relations to the conquered States are those of conqueror and master. If, however, there were antecedent relations, which the war has not broken, they are resumed the moment the war is over. The only inquiry in the present case is, whether the rebellion or the war has abolished or changed the *legal relations* of the State to the Union. Now, as we maintain that no act of the Federal Government can exclude a State from the Union, so no act of the State can withdraw it from the Union. The war found it in the Union, subject to its laws; the war left it in the Union, subject to the same laws.

In barbarous times, the laws of war authorized the reduction to slavery of a conquered people. These laws have been softened under the influence of Christianity and civilization, till now it is the settled public law of the Christian and civilized world, that the conquest of one nation by another makes no change in the property, or the personal rights and relations of the conquered people. "The people change their allegiance,"

says Chief-Justice Marshall,\* "their relation to their ancient sovereign is dissolved, but their relation to each other and their rights of property remain undisturbed." One change only is effected, and that is, that one sovereign takes the place of the other. *In a civil war, sovereigns are not changed* unless the rebellion is successful.

It is very true that the rebel States themselves renounced their allegiance to the nation, or rather they denied that they owed any such allegiance, and maintained that their relation to the Union was that merely of parties to a compact. We, however, denied their theory, and insisted that they owed allegiance which they could not renounce; and, for the support of these opposite theories, each side took up arms. Now that we have won, it is not for us to deny the cause for which we fought. We are striving to maintain the supremacy of the Constitution in the Southern States, not so much for their sakes as for our own.

A little reflection will satisfy us that the opposite doctrine may lead to the most alarming consequences. Suppose that in Shay's rebellion the insurgents had got the better of the State government, and the troops of the United States having been brought in, had suppressed the rebellion, would Congress, in that event, have been justified by the Constitution in imposing its own government upon Massachusetts? If the Federal Legislature may impose a government with one view, it may with another. It may impose one with a design to restrict the suffrage, as well as to extend it. Suppose hereafter a negro insurrection to occur in a Southern State, or even a peaceable change to be made in its Constitution for the purpose of excluding a majority of the whites from the government, and domestic violence and revolt thence to ensue, resulting in Federal intervention and suppression, would Congress in that event be justified by the Constitution in assuming the government of the State and restricting the suffrage to the whites? Let me put this question: Suppose Mississippi, in a war between the United States and Great Britain, had been conquered by the latter, and then retaken by the United States, would this government hold the State as conqueror or as Federal sovereign under the Con-

\* U. S. *vs.* Churchman, 7 Pet., 87.

stitution? Most clearly the latter. The doctrine of *postliminy* rests on that foundation.

Let us look abroad and see what crimes have been committed under the plea of conquest. Ireland is a memorable example. "To the charge of arbitrary government in Ireland," says Goldwin Smith, "Strafford pleaded that the Irish were a conquered nation. 'They were a conquered nation,' cries Pym. 'There can not be a word more pregnant and fruitful in treason than that word is. There are few nations in the world that have not been conquered, and no doubt but the conqueror may give what law he pleases to those who are conquered; but if the succeeding acts and agreements do not limit and restrain that right, what people can be secure? England hath been conquered, and Wales hath been conquered, and by this reason, will be in little better case than Ireland. *If the King, by the right of a conqueror, gives laws to his people, shall not the people, by the same reason, be restored to the right of the conquered, to recover their liberty if they can?*'"

Hungary is another example. The house of Hapsburg was deposed by the estates of the kingdom. A bloody war followed, and the estates were conquered. Then ensued a strife between the Emperor and his subjects, whether he was King of Hungary by the conquest, or King by the Constitution, till, after long years, ending with the disastrous day of Sadowa, he was compelled to yield, and the Hungarians are now resting in the shelter of their ancient Constitution.

Therefore I insist that the right of conquest gives no countenance whatever to the idea that Congress can take into its hands the government of Mississippi. I need not add to what I have already argued that, if Congress had any such right, it could not exercise it by the military power.

The *third* reason given for the military government of Mississippi is, that the rebel States and their people forfeited their rights by the rebellion. This is the language: "The State of Mississippi and the people of Mississippi have forfeited all their rights. That is to say, they are outlaws." How have they forfeited all their rights? Have they forfeited them by the attempt to withdraw from the United States—the peaceable act of secession, if there could be such a thing—that is to say, by



the mere act of renouncing their allegiance? Most certainly not. They have denied the right of the Federal Government to keep them in the Union. But does that result in the change of our rights? It is not so in the case of private contracts. One can not be absolved from a contract without the consent of the other party. Does war produce these results? When war exists, then there is a levying of war against the United States. But levying war is treason! Did they forfeit their rights by treason? Undoubtedly, there is a forfeiture when there is a conviction, but not before. Though every man in Mississippi were guilty of treason, not one could be touched by an Act of Congress, except upon conviction; because, as we all know, Congress is expressly forbidden to pass an act of attainder. There may be in Mississippi a million of people: Congress has not the power to pass an act against one of them, declaring that, whereas he has been guilty of treason, he may be taken and punished without conviction. Still less can they pass an act against the whole people.

There is a fallacy in the assertion, so often made, that the rebel States and people have forfeited their rights by the rebellion. The proposition is stated in its strongest form when it is said that the *war* of the rebels was treason, and that traitors have no rights. But it is not true that traitors have no rights; they have all their rights until they are judicially condemned; or, perhaps the better form of stating the proposition is, that they are not to be accounted traitors until they are convicted of treason. The Constitution has carefully defined treason to consist in levying war against the United States or adhering to their enemies, giving them aid and comfort, and has declared that no person shall be convicted of this crime, unless on testimony of two witnesses to the same overt act, or upon confession in open court. So there can be neither treason, nor penalty of treason, until after conviction; and Congress has not competency to convict, however great and manifest may be the crime.

There is another answer to the argument of forfeiture, and that is that treason is a *personal* crime. There can be no treason of a State, though there may be of all the persons who compose it. Whatever may have been the misconduct of the citizens of Mississippi, even though every one of them were

guilty, the State, the corporate body, did not, because it could not, commit the crime of treason.

The *fourth* reason given for governing Mississippi by military power is belligerent right. It is said that Congress may assume the government of Mississippi by virtue of this right. The first answer to that argument is this: There can be no belligerent right where there is no belligerent; and there is no belligerent, because the war is ended. There are no belligerents, because there is no *bellum*. That is the first answer. The next is, that during the war, *flagrante bello*, it was not competent for the United States to assume the entire government of a State which they occupied with their forces. Let me ask your attention to this position for a few moments. What could the United States do by virtue of their belligerent rights? They could wage war as other wars are waged; they could ravage and kill; could fight the armies of their enemies and capture cities; could make assaults upon forts and subdue them. But could they govern? That is to say, could they take into their own hands the whole government of a State which they had succeeded in occupying with their forces? I am not asking what they could do in the act of waging war; but I am supposing that they have occupied the whole State of Mississippi, so that there is not a hostile arm lifted in the State, and that they are carrying on their hostile operations beyond the State. I deny that they have then the power to assume the government of Mississippi to themselves. What authority has an army of a sovereign, occupying its own territory, when every hostile force is subdued, to take into its own hands the government of the country by a right paramount to his antecedent right?

Suppose, however, they say—and this is the way in which the argument is put—suppose that there is utter anarchy; suppose that in the State of Mississippi, during the occupation of it by our armies, there is such anarchy that no law is enforced, and not a magistrate is sitting in the State. I am supposing a case which does not exist. It seems to me a very idle discussion; but my learned friends have made an argument upon it, and therefore I must notice it. I therefore ask, What may an occupying army do? The occupying army may keep the peace,

and that is all. Is it to force institutions upon the country? What right has New York, I should like to know, to force its institutions upon Mississippi under any circumstance whatever? War does not give the right. What does? Is it anarchy? Then the question comes to this: Does a condition of total anarchy in one State give the other States a right to go in there and construct their government? I deny it. I am not discussing the right of revolution. I may admit that the people of nine tenths or three fourths of the States have the right, by an act of revolution, to invade and subdue a State, because the law of self-preservation is above all others. But that is not the question. The question here is one of constitution. I deny that even in a condition of absolute anarchy the State of Iowa can be forced to take the institutions of New York; the people of New York can not go there to demand that the people of Iowa shall receive their form of municipal or State government. It is for Iowa to determine for herself. The fundamental doctrine of our Government is, that the people have a right to change their own form of government as they please. That is set forth in almost every one of our State Constitutions, and from that it results that no other State has a right to intervene.

But, as I said, this is, after all, but a speculative discussion; it is one that should not enter into this case at all, and one which I should not have entered upon if I had had the opinion just read by Mr. Chief-Justice Nelson, where the revolutionary government of the Confederacy is said to have been a government *de facto*, with all its departments, legislative, judicial, and executive, having every function of government in full operation. If that is so, then the States that compose it had the same, and Mississippi was among the rest. They had *de facto* governments, with all their departments, and the argument from the necessity of assuming the government by reason of anarchy is one that has no foundation whatever. But one of the learned counsel says, "These *de facto* governments were not governments *de jure*, because their members had not taken the oath of allegiance to the United States." Let us look at that. I admit that they were not governments *de jure* in a Federal sense, for they had renounced their allegiance. They could

not send members to Congress. They had Legislatures not acknowledging fealty to the United States, and for that reason they could not send Senators, and for a similar reason their people could not send members to the House of Representatives. But is it true that, because they had thrown off their allegiance, all their acts of legislation were null? Look at Mobile; is every act of the City Council of Mobile since the war began a nullity? When did the Virginia Legislature resolve not to take the oath of allegiance to the United States? How long ago? Before the war, I believe. Has not Virginia been a legal State government since that time, I ask? The obligation to take the oath is directory; that is all. If their members do not take the oath they are none the less governments. The Constitution of the United States provides that all legislative and judicial officers shall take oath to support the Constitution. Now, if nullity is the consequence of not taking the oath, there has been no lawful Judge upon the bench in the South since the war began; and there has been no judgment which is not a nullity from 1861 to 1864. Is that so? Is any man in his senses prepared to assert that?

This should seem to be a sufficient reason, but, as the argument is much insisted on, I will follow it further. The question of belligerency and belligerent rights received great attention in the prize cases, where the Court laid down certain fundamental propositions. One of them, relating to the fact of civil war existing, was this: "The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice can not be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.'"

Applying this rule to the present case, it follows that civil war can no longer be recognized as existing in Mississippi, because the courts are open. Therefore, whether, during the war, the just exercise of belligerent rights would have authorized the Federal Government to take into its hands the entire gov-

\* 2 Black, 667.

ernment of the State or not, there is no warrant for any such exercise now.

Another proposition in that case was, that the Courts will take judicial notice of the beginning and progress of the civil war. Of course, for the same reason, they will take judicial notice of its end.

The Court says: "By the Constitution, Congress alone has the power to declare a national or foreign war. *It can not declare war against a State*, or any number of States, by virtue of any clause in the Constitution. *The Constitution confers on the President the whole executive power*. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. *He has no power to initiate or declare a war either against a foreign nation or a domestic State.*"

A further proposition of that case was that, by exercising belligerent rights, the United States did not lose those which were sovereign. If their sovereign rights remained, their duties as sovereign remained also. The exercise of belligerent rights was, in fact, for the purpose of regaining the complete enjoyment of their sovereign rights, and for no other purpose.

Here is the language of the Court: "The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other."

It should not be forgotten that belligerent rights are to be exercised by the Executive, and not by Congress. In the present instance, the Executive exercises, and attempts to exercise, none against the State of Mississippi, or any of her people. Indeed, he disclaims any such authority: these military acts were passed over his veto; and if the argument from belligerency should prevail, we should have the extraordinary spectacle of the Legislature exercising an executive function, without the consent and against the protest of the Executive.

It has been already observed that while the war lasted their

belligerent rights did not authorize the United States to carry on the entire government of Mississippi. They might govern their own armies and subdue the armies of the rebels. As soon as that was done, or as fast as they advanced, they could proceed to organize their own displaced government in its former estate, open the Federal Courts, run the Federal mails, collect the Federal revenue; in short, do all that they could do before. But might they not do something more? That depends upon their rights and their duties under the Constitution. This government is a limited one, and its rights and duties are defined and limited by the Constitution, and if you can not find there the warrant for its action, it can not act at all. If a State of this Union should fall into great disorder, so that her finances should become ruinous, her treasury bankrupt, her roads be infested by robbers, property and person be insecure, with an impotent Executive, a babbling Legislature, and a venal judiciary, could Congress step in and take the government of that State into its own hands? I can perceive no authority for their doing so; and if authority be necessary, it must be sought by an amendment of the Constitution. It is as clear as noonday that the theory of our present Constitution is, that the States shall organize themselves, and that Congress has nothing to do with it; except, that if in such organization the States should introduce aristocratic or monarchical innovations, it might then interfere to insist upon their going back to their republican forms.

But it may be asked, Can not the Federal army, which goes into a State to suppress a rebellion, govern the parts into which it advances? I answer, as a similar question was answered in Milligan's case, "*Necessitas, quod cogit, defendit.*" The advancing and occupying army must govern itself by the laws of war; it must keep the peace within its own lines, and for that purpose it must govern the people within them, so far and so far only as ordinary civil government is impossible. For example, when the city of New Orleans was taken by the Federal forces, all the Federal laws applicable to the port and district went again into operation; but if there were no State officers competent to administer or execute the State laws, the commanding officer of the occupying forces must, of necessity,

for the safety of his own army, as well as of the society within his lines, preserve order, and might make regulations for that purpose. This, I suppose, is the rule and the whole of it.

Even this power ceases with the necessity of its exercise. The moment the military occupation (*occupatio bellica*) ceases, that moment the right to govern, even within the narrow limits which I have explained, ceases also. Is there no period, then, after the cessation of hostilities during which the military occupation may continue? No intermediate state between the state of war and the state of peace? No interval after hostilities, and before the reëstablishment of civil government? To this question, as applicable to this case, I answer:

I. The occupying forces must have reasonable time to retire with their war material; and, so long as they necessarily remain for that purpose, so long the reason of the rule applies, and therefore the rule itself; but they have no right to remain longer.

II. The *Federal* civil government is, of course, capable of being put into full vigor as soon as the rebellion is suppressed. To guard the Federal property, to protect the Federal officers, to assist in the execution of Federal process, the troops may always remain, in peace as in war.

III. If no State authorities whatever are left, and the people are absolutely without magistrates or officers of any kind, so that the withdrawal of the Federal troops would be the signal of a general massacre or pillage, then the troops may remain, just as any other body of men may remain, in the interest of humanity, and upon principles of common or universal law, to prevent the commission of crime or violent injury to person or property. If the captain of an American frigate in a Chinese port finds a condition of anarchy and general pillage on shore, I suppose he may land the ship's company to stop the violence and rapine; but that does not imply any right in the captain to govern the town.

IV. If there be an existing State government *de facto* or *de jure*, the question can not arise. There was such a government in Mississippi when the war closed. The retirement of the Federal troops would have left the State impoverished and exhausted, no doubt, but not without a government.

If this Court is not bound by the declaration of Congress, that there are no legal State governments in the South, no more is it bound by the declaration of the President that there were none when the war closed. Indeed, if I might venture the suggestion, which I do with great diffidence, the true course at the close of the war was to consider the governments then in existence as governments *de facto*, which could become governments *de jure* on taking the oath of fidelity to the Federal Constitution. Congress would not have felt itself obliged to admit any but loyal representatives to seats. This suggestion is not important to my argument, but candor obliges me to say that I think the source of all the difficulty that has since been encountered was in the departure from the true theory of our Government when the rebel army surrendered. Indeed, I can not help thinking that the general form of capitulation arranged by General Sherman was, without reference to its details, constitutional and statesmanlike.

Having thus shown that the occupation of a State by a conquering army did not affect any such change in the rights and duties of the people as is supposed in the defendants' argument, even if the two contending parties were regarded as independent States, and the war what is called by jurists a public war, I might add, as an additional and conclusive argument of itself, that in a civil war there can be, strictly speaking, no such occupation—*occupatio bellica*. "In a civil war," says Phillimore, "there could be no *occupatio*."\* "A civil war," says Grotius, "is not of the same kind, concerning which this law of nations was instituted."†

Halleck, in his work on "International Law," p. 806, § 29, says :

"In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists, who have commented on this transaction, agree that the debt was not legally discharged : first, because in a civil war there could be, properly speaking, no *occupation* ; and, second, because it was a private and not a public debt."

In a late case in North Carolina, where it was attempted to

\* 3 Phill., Int. Law, 704.

† Grotius, l. 2, c. 8, § iv.



apply the principles of the "*occupatio bellica*" to the sequestration, by acts of the insurgent State, of a debt due to a citizen of a loyal State, the Court rejected the defense, and said: "These acts did not affect, *even for a moment*, the separation of North Carolina from the Union, any more than the action of an individual who commits grave offenses against the State, by resisting its officers and defying its authority, can separate him from the State. Such acts may subject the offender even to outlawry, but can discharge him from no duty, nor relieve him from any responsibility."

After this opinion of the Chief Justice, let me read from the opinion of Mr. Justice Sprague, in the case of the *Amy Warwick*: \* "An objection to the prize decisions of the District Courts has arisen from an apprehension of radical consequences. It has been supposed that if the Government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error; a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterward on the ocean, even where peace could not have been known, is unauthorized, and property so taken is not a prize of war and must be restored.† Belligerent rights can not be exercised when there are no belligerents. Titles to property or to political jurisdiction, acquired during the war by the exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise during peace all rights which appertain to his title; but they must be rights only of proprietorship or sovereignty: they can not be belligerent. Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of what it had been temporarily deprived. The nation acquires

\* 24 Law Rep., 498.

† Wheaton, "Elements of International Law," 619.

no new sovereignty, but merely maintains its previous rights.\* During the war of 1812 the British took possession of Castine, and held exclusive and unlimited control over it as conquered territory. So complete was the alienation that the Supreme Court held that goods imported into it were not brought into the United States, so as to be subject to import duties.† Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all preëxisting political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the Constitution. In a civil war, the military power is called in only to maintain the Government in the exercise of legitimate civil authority. No success can extend the power of any department beyond the limits prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any Act of Congress which would annul the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a State have passed such ordinances can make no difference. They are legal nullities; and it is because they are so, that war is waged to maintain the Government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark that I do not mean that the restoration of peace will preclude the Government from enforcing any municipal law, or from punishing any offense against previous standing laws."

Thus, if the Court please, have I gone over these four reasons, and I close what I have to say upon them with a single

\* Wheaton, 616.

† U. S. vs. Rice, 4 Wheat., 246.

example from the Federal Government itself. What was done by that Government itself as it advanced? I take its own acts. Although the rebel capital was at Richmond, although the rebel flag was floating within sight of this Capitol, Senators were received from Virginia into the Senate, and Representatives from Virginia into the House of Representatives, upon the ground that as we advanced into the country the part occupied immediately reverted to its old condition, and was entitled to its civil government and to have representation in Congress. This is the way in which we dealt with the part which we occupied. We could not hold Alexandria for a moment but by bayonet and cannon; we did so hold it, and we received representatives elected by the people within our lines.

Now, let me pass, with your leave, from the consideration of these four reasons, as they have been stated in debate, for the assumption by Congress of the government of the State of Mississippi, and ask your attention to the particular reasons given by my learned friends who have argued on the other side. But before I do that let me turn aside for a moment to answer what I suppose was intended to be an *argumentum ad hominem*, but which I think entirely fails in this place. This is the argument: The President, at the close of the war, declared that there was no civil government in the rebel States, and proceeded to organize governments. The brief of one of the counsel is much occupied with the correspondence between the President, the Secretary of State, and the provisional Governors, and the steps taken to govern the States provisionally. The answer to that argument is, that we have nothing to do with the action of the President on the subject, and whether he was right or not, whether he took a constitutional view of the case or not, it makes no difference to us. But there is a further answer, which is this: whether the provisional governments established under the authority of the Executive were or were not legally established, *de facto* governments were established under them which were recognized by the people and were in possession of all the attributes of sovereignty; had legislative, judicial, and executive departments, and were going on as regularly as any States in the Union at the time these

reconstruction acts were passed; and consequently it would not advance the argument at all to show that the antecedent provisional governments were not warranted by the Constitution. I therefore pass over that argument because it has no place here. It is enough for us that the governments of the States were in operation. And we know, by the reports of the General of our army, that order prevailed throughout the South before these acts of reconstruction were passed.

I am now ready to examine the terms of the particular propositions which have been stated by the counsel on the other side in support of their case. There are six of them, thus expressed :

1. "That Mississippi has no State government which is entitled to be recognized by the United States as a State of this Union; and that this has been determined by the political departments of this Government."

2. "That the decision so made is binding and conclusive upon this Court, notwithstanding the Judges may think the decision erroneous."

3. "That it is the undoubted right and duty of the United States to aid the loyal people of Mississippi in establishing a republican State government for that State, and that the United States is now engaged in the performance of that constitutional duty."

4. "That the grant of power to the United States to 'guarantee a republican form of government' to the States of the Union, not being restricted by the Constitution, as to the means which may be employed to execute the power, Congress is the exclusive judge of what means are necessary in a given case."

5. "That the act in question, with the act supplemental thereto, regarded as embodying the means adopted by Congress for this purpose, violates no provision of the Constitution of the United States."

6. "That inasmuch as Congress entered upon the prosecution of the war against the rebel States in 1861, this Court is and will be bound judicially to recognize war as still existing, until Congress shall declare peace to be restored, or shall cease to exercise any belligerent right toward those States."

The fifth of these propositions is merely a supposed conclusion from other propositions, and need not be separately considered. The fourth is met by what I have already said about the use of prohibited means to secure an end, however constitutional and desirable that end may be. I have shown that military government is prohibited. So that, even if the first three and the sixth propositions were all conceded, these military reconstruction acts could not be defended.

The third proposition has already been sufficiently answered. The first two and the sixth alone remain to deserve particular attention; and, even in respect to the sixth, I have already shown that belligerent rights can not continue to be exercised unless the war can be prolonged by a fiction.

The discussion of these three propositions—that is, the first, second, and sixth—may be separated into four divisions:

1. Is Mississippi, in fact and in law, a State of the Union, having regard only to the conditions of rebellion and war, without reference to the declaration of the legislative and executive departments of the Government upon the question? In other words, did the rebellion, or the war, or both, put Mississippi, *as a State*, out of the Union?

2. Is war, in fact and in law, still subsisting between the United States on one side, and the State, or State government, or people of Mississippi, on the other side, without reference to the declaration of the legislative and executive departments of the Government upon the question?

3. What has been the declaration of the legislative and executive departments upon these two questions?

4. What is the legal effect of such declaration?

In the first place, did the rebellion or the war, or both, put Mississippi, *as a State*, out of the Union?

This raises what I may call the *metaphysical* question. Horne Tooke protested that he had been the victim of a preposition. If the Southern States are to be held by this military government, after every hostile army has been surrendered, and every unfriendly hand has been lowered, they will be the victims of metaphysics imported into politics.

Mississippi was a State of the Union once. When did she cease to be such? Was it when she adopted the ordinance of

secession, on the 9th of January, 1861, before a shot had been fired?—that is to say, did the act of renouncing her allegiance alone take her out of the Union? Was a *resolution* so potent as to dissolve her relations to the United States?

The day after that ordinance was passed, was she not still a State in this Union? Suppose the Chief Justice had been holding court at Jackson, the day after secession was declared, and a citizen of Ohio had sued, in the Circuit Court of the United States, a person in Mississippi, as a citizen of that State, would the Judge have been obliged to hold that there was no such person as a citizen of the State of Mississippi? The jurisdiction of the Circuit Court could not have been maintained unless one of the parties was a citizen of a sister State, and the other party a citizen of Mississippi. Were the judgments of the Courts in Mississippi no longer judgments to be recognized in the other States of this Union? Were the judgments of the other States in the Union no longer to be recognized in the Circuit Court of Mississippi? I do not ask what the people of Mississippi may have thought, but what this Court would have been bound to hold. Of course, the statement of the proposition in this form answers it. It is so absurd that nobody will pretend that the act of secession carried the State out of the Union. In fact and in law, Mississippi was as truly a State in the Union after secession as before.

The denial of one's obligations can never *legally* effect his release from them, or change his *legal* relations to the one to whom the obligations are due. In this complex government of ours, the effect of a change of the legal relations of the State to the Union would be a change of the legal relations of the different States to each other. Let us look at some of the consequences. The mere act of secession of Mississippi, not followed by any collision of forces, would have the effect of depriving a citizen of Wisconsin or Illinois, going there, of his equal rights in Mississippi; would render the judgments in the Courts of Mississippi no longer conclusive in the Courts of Wisconsin or Illinois, and so of the judgments of those States in Mississippi; would make a judgment in the highest Court of Mississippi no longer examinable in this Court, however repugnant to the Federal Constitution and laws; would deprive

a citizen of Wisconsin or Illinois of the right of suing in the Circuit Court of the United States for the Mississippi district; in fact, would drive that Court out of Mississippi, for certainly it can not sit there, if that State is not as such in the Union. These are but examples; the list may be increased indefinitely.

And how could this state of things be remedied? You could not send the army there; for, in the case supposed, there would be no resistance to overcome. The consequences would be then, in effect, the withdrawal of a State from the Union without a blow.

Would a collision of forces change the *legal* relations, so as to effect by war what was not effected by secession? That depends upon the change which war produces; that is, it depends upon the nature and effect of belligerent rights. But these I have already considered, and I have shown, as I think, that the rights of the United States, as belligerents, give Congress no constitutional authority to pass these military statutes.

Let me now recur to the supposed principle upon which the counsel on the other side deduce the result that Mississippi is no longer a State of the Union. It is this, as I take it from their own language: Mississippi is not a *State* of this Union, because she "has no *State government* which is entitled to be recognized by the United States as a 'State' of this Union." Here is a fallacy at the outset, arising from a confusion of ideas. A *State* and the *government* of a State are two different things, as much so as a corporation and its governing body, or board of directors, are two different things. The original idea of a State is a community independent of all other communities. The States of the American Union, being originally independent, became united by the surrender of a portion of their sovereignty to a nation composed of all the States. Whether their relations to this nation can be dissolved or impaired, depends upon the nature of the Union, whether it be, or be not, indissoluble. We agree that it is indissoluble. No argument is necessary or would be permitted on this point.

But it is asked, Might the State of Mississippi send Senators to Congress during the war? I answer, as I have already answered in effect, No; for the simple reason that there was

nobody competent to send them. They must be sent by Legislatures, acting under the Constitution of the United States. The Senate is the judge of the election and qualification of its own members, and is not bound to receive those who come in upon contempt of their authority, or with a feigned submission. There may be a State in this Union with a disloyal State government, although State magistrates who reject the *Federal authority* are thereby rendered incapable of executing any *Federal function*. This proposition answers the argument made against us.

A State does not change with a change of its government. One of the fundamental doctrines of public law is, that the State is immortal. Governments, sovereigns, dynasties appear and disappear, but the State remains. The debts contracted by France under Napoleon I. were the debts of France under Louis XVIII, under the Citizen King, and under the republic.

The proposition of the other side, which we are considering, contradicts in fact their fourth proposition; for, if Mississippi be not a State of the Union, Congress has no power under the clause authorizing it to "guarantee to *every State in the Union* a republican form of government."

If you can blot out a State, then of course she ceases to be; but she is not blotted out by any change whatever in her State government. New York might make this peaceful revolution a hundred times, so that she be still republican in form, and she would be still the same sovereign State in this Union.

*Next*, is war, in law and in fact, still subsisting between the United States on the one side, and the State and people of Mississippi on the other, laying aside the declarations of the Executive and of Congress? You yourselves, in the decisions of the prize cases, have given the answer, by holding that war does not exist when the Courts are open; that is to say, when the Federal Courts are open. You know that the Federal Courts are open throughout Mississippi, and you know, therefore, that there is no war, whatever declarations may be made to the contrary. You know that the District Courts are sitting throughout the South; you know that some of your own body sit there; you know that this is an appeal from a Circuit Court in Mississippi. And yet we are told that the United States



are at war with Mississippi; that there is a state of war existing which authorizes martial rule.

But, further, what has been the declaration of the legislative and executive departments of the Government in respect to Mississippi and the other rebel States, for I consider them together? At the risk of wearying you I must call your attention to various documents, by which I shall show that Congress has recognized these States, Mississippi among the rest, as being in the Union, by many acts since the war commenced, and down to the very day when the first reconstruction act was passed. As to the executive department, you need no documents to be referred to. That this department has recognized Mississippi as being a State in the Union you know. We have had proclamation after proclamation, under the hand of the Executive, to that effect.

What has Congress done? The Constitution provides, as you remember, that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union." You can not apportion representatives and direct taxes except among the States of the Union. What do we find among the first acts of Congress on this subject after the rebellion began? On the 5th of August, 1861, Congress passed an act "that a direct tax of \$20,000,000 be and is hereby annually laid upon the United States, and the same shall be and is hereby apportioned to the States respectively, in manner following: To the State of Mississippi, \$413,084 $\frac{1}{2}$ ." This was in August. Mississippi seceded in January preceding. Was not that a declaration of Congress that Mississippi was one of the States of this Union at that time, six months after the act of secession, and during flagrant war? These acts have been regularly continued from year to year down to 1866, as you will see by reference to the statute-book. So that Congress has regularly provided for the apportionment of direct taxes among the States which are included in this Union, Mississippi among the rest. Is not that a recognition? Next, in the act of July 16, 1862, the rebel States are all divided into districts for the different Circuit Courts. That could not be unless they were States in the Union. On the 2d of March, 1867 (chapter 185), an act was passed in respect to

appeals from rebel States. That could not be unless they were States in the Union. Then the laws as to the public lands show the same recognition ; there are several of them. The non-intercourse acts show the same. Look at the joint resolution of the 8th of February, 1865, relating to the electoral colleges. Let me read it to show how completely Congress kept in view the constitutional relations of the States down almost to the day when it passed the first reconstruction act :

*"Whereas, The inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the Government of the United States, and were in such condition on the 8th day of November, 1864, that no valid election for electors of President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day : therefore,*

*"Be it resolved, etc., That the States mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college for the choice of President and Vice-President of the United States for the term of office commencing on the 4th day of March, 1865 ; and no electoral votes shall be received or counted from said States concerning the choice of President and Vice-President for said term of office."*

Look at the constitutional amendment, that great amendment abolishing slavery. Congress proposed it by the requisite majority and ordered it to be sent to the Legislatures of the several States, not excluding any State from the consideration of the proposition. It was sent to every State in the Union, and here is the proclamation of the Secretary of State in regard to its adoption, made as early as December, 1865, in respect to which no dissent has ever been expressed by either House of Congress :

"Know ye that whereas the Congress of the United States, on the 1st of February last, passed a resolution which is in the following words, namely (reciting the constitutional amendment abolishing slavery) :

"And, whereas, it appears from official documents on file in this department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia, in all twenty-seven States ;

"And, whereas, the whole number of States in the United States is thirty-six; and whereas, the before specially named States whose Legislatures have ratified the said proposed amendment constitute three-fourths of the whole number of States in the United States:

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the 20th of April, 1818, entitled 'An Act to provide for the publication of the laws of the United States, and for other purposes,' do hereby certify, that the amendment aforesaid has become valid, to all intents and purposes, as a part of the Constitution of the United States."

Among the ratifying States are Louisiana and South Carolina, without whose votes the amendment would not have been adopted. Consider for a moment the decision of the Chief Justice in North Carolina. I am not able to say, from the report of the case, whether one of the parties was designated as a citizen of one State and the other of North Carolina.

The CHIEF JUSTICE: They were.

MR. FIELD, resuming: Tell me, then, if that be a legal judgment or not? The Chief Justice here made a memorable decision which satisfied the legal mind of the country, when, if the argument of our learned opponents be sound, he had no more jurisdiction than I. There was in the case supposed no citizen of North Carolina, because there was no State of North Carolina, and the judgment was void. But I have not yet done. Has there been a legal government of this Union during the war? Are the acts upon the statute-book of Congress binding? Is it not a familiar principle that the verdict of a jury in order to be valid must be a verdict of twelve men, and it becomes good for nothing if one member be added to the jury, making the verdict of thirteen? During all this war, up to the time when the reconstruction act was under consideration, there were two Senators in the Senate-Chamber from the ancient State of Virginia. But Virginia is said now not to be a State in this Union, and of course never has been since the war began or since she seceded. If so, you have had two members in the Senate of the United States all the time who had no right to be there. What is the effect of that upon legislation? Has that been considered? By what sort of legerdemain, I ask, is it that Virginia, which had seats in Congress

up to 1866, is now declared not to be entitled to any representation? It had four members in the Lower House during nearly the whole war, this State of Virginia, which is now alleged not to be a State in the Union at all. Where under the Constitution is there power to give any man a vote in the House of Representatives unless he be from a State? Congress is receding and going back upon its own footsteps. We are arguing for constitutional, regular governments; our opponents are the revolutionists. Tennessee is another State. There was one Senator at least who stood his ground, "faithful among the faithless," and he remained in the Senate after the secession of his State, I think, two years, till 1863—yes, two years and over—and that Senator was Andrew Johnson. What right had he to be in the Senate if Tennessee was not a State in this Union? Will you tell me? Were any laws passed with his concurrence and by the help of his vote? If we go into the House of Representatives, we find that Tennessee had two members there, Clemens and Maynard, Maynard continuing during the whole war. And yet, if you look at the most remarkable joint resolution of the 24th of July, 1866, you may infer that Tennessee has been out of the Union all the time. Here it is :

*"Whereas, In the year 1861, the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State, in pursuance of an Act of Congress, here declared to be in a state of insurrection against the United States; and whereas, said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas, the people of said State did, on the 21st day of February, 1865, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished, and all ordinances and laws of secession, and debts contracted under the same, were declared void; and whereas, a State government has been organized under said constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the Thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty; therefore,*

*"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Tennessee is hereby restored to her former proper political relations to the Union, and is again entitled to be represented by Senators and Representatives in Congress."*

Was there ever such a document as that since the world began? Whereas the State of Tennessee has ratified the constitutional amendment, therefore she may be restored, forgetting that if she was not a State, with a legal State government, the ratification was just so much waste paper. Let us go to Louisiana. She is in the same predicament. We have had in the House, from Louisiana, Flanders and Hahn, from March, 1863, to March, 1865. What will our friends say to that?

I will now ask your attention to the action of the legislative and executive departments of the Government in respect to the question of existing war or peace. You remember that the argument of my learned friend was, that we are now in a state of war; that we have a right to exercise the rights of war; and that exercising the rights of war we can govern the State of Mississippi as we will. Here is a list of acts and resolutions of Congress to show that they have recognized war as ended and peace as restored throughout the United States. The statute-book is full of references to "the late war," and "the war that has closed," and "the war that is happily ended." Among these acts is one of March 2, 1867, passed the same day the first reconstruction act was passed, increasing the pay of non-commissioned officers and soldiers, as follows:

"SEC. 2. *And be it further enacted*, That section 1 of the act entitled 'An Act to increase the pay of soldiers in the United States army and for other purposes,' approved June 20, 1864, be and the same is hereby continued in full force and effect for three years from and after the close of the rebellion, as announced by the President of the United States by proclamation bearing date the 20th of August, 1866."

Here is the proclamation of the President, to which this act refers, reciting the previous proclamations, and ending as follows: "I do further proclaim that the said insurrection is at an end, and that peace, order, and tranquillity, and civil authority now exist in and throughout the whole United States of America." Can anything be imagined more extraordinary than that the same persons who passed these acts should come here to maintain that we have a right to deal with the South as if there were no peace, but flagrant war to this very hour? There is another comprehensive act which, I should think, might alone determine the question as to the state of the South. It

is an act passed the same 2d of March. In the desire of Congress to indemnify everybody they ratified everything that the President had ever done. The act is as follows :

"An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion against the United States.

"*Be it enacted*, etc., That all acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval after the 4th of March, Anno Domini 1861, and before the 1st day of July, 1866, respecting martial law, military trials by courts-martial or military commissions, etc., during the late rebellion, are hereby approved in all respects."

Finally, I will read a very appropriate resolution of thanks, as follows, passed in May, 1866 :

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is the duty and privilege of Congress to express the gratitude of the nation to the officers, soldiers, and seamen of the United States, by whose valor and endurance, on the land and on the sea, the rebellion has been crushed and its pride and power have been humbled, by whose fidelity to the cause of freedom the government of the people has been preserved and maintained, and by whose orderly return from the fire and blood of civil war to the peaceful pursuits of private life, the exalting and ennobling influence of free institutions upon a nation has been so signally manifested to the world."

Have I not said enough to show that the legislative department of the Government, as well as the executive, has recognized, first, the State of Mississippi as being in the Union; secondly, has recognized a government as there existing; and, thirdly, has recognized the war as ended, and peace, order, tranquillity, and civil authority as existing throughout the land?

Finally, it has thus become unimportant to consider further what would have been the effect of the declarations of Congress and the President, if they had, in the face of incontestable fact, declared that Mississippi was no longer a State in this Union, and that war still raged between her and the United States; and I will waste no time upon that subject.

These are my answers, if the Court please, to the propositions brought forward by the learned counsel, and elaborately argued; and I hope that I have given—imperfectly, I grant—a sufficient answer to them all.

There yet remains another point, not in the brief, nor do I find it in any written paper, but very much urged in the argument, and constantly referred to in public speeches, and that is **NECESSITY**. These military governments of the South, they say, are legal because they are necessary. The usual phrase is: "This Government has a right to live, and no other government has a right to contest it; and whatever Congress determines as necessary to this national life is right, and therefore the Executive and this Court are to recognize it as so." What necessity do they speak of? There is no Federal necessity. The Federal courts are open; the Federal laws are executed; the mails are run; the customs are collected. There is no interference with any commissioner or officer of the United States anywhere in the country. There is no necessity, therefore, of a Federal kind for an assumption of the government of Mississippi. What, then, is the necessity? "Why," they say, "these are unrepentant rebels." Is that the reason why the military government is there? If you are to wait until you get repentant rebels—or I should perhaps rather say, if you wait until you make rebels repentant by fire and sword, you will have to wait many generations. Of all the arguments, that of necessity is the most remarkable and has the least force. "We will not allow the Southern States to govern themselves, because, if we do, the government will fall into the hands of unrepentant rebels." Well, what is that to you, if they obey the laws—if they submit to your government? Do you wish to force them to love you? Is that what you are aiming at? Of course, it should be the desire and the aim of all governments to make the people love, as well as obey; but, to give that as an argument for a military government, is an extraordinary one. "Well, then," they say, "we must protect the loyal men at the South, and therefore the military government, which is the only one adequate to the end, must be kept up." To that I answer, first, that the General of your armies, the person upon whom this extraordinary power has been thrown, himself certified that there was order throughout the South, so far as he could observe. But are there no other means than military coercion? The Union men of the South, we have been told, are in the majority, and have ever been in the majority, and it is the

minority by which the people were driven into secession. Is government by the United States necessary to sustain the majority against the minority? A majority, we are told, of the white people! They say that secession was carried by a minority of the white people against the majority, and that the majority have always been loyal. That is a perfect answer, then, to the objection. Necessity is the staple reason given by tyranny for misgovernment all the world over. It was the reason given by Philip II for oppressing the Netherlands by the Duke of Alva; it was the reason given for the misgovernment of Italy by Austria; it was the reason given for the misgovernment of Ireland by England.

"This nation has a right to live." Certainly it has, and so have the States, and so have the people. Every one of us has the right, and the life of each is bound up with the life of all. For, who compose my nation, and what constitutes my country? It is not so much land and water. They would remain ever the same, though an alien race occupied the soil; there would be the same green hills, and the same sweet valleys, the same ranges of mountains, and the same lakes and rivers, but these all combined do not make up my country. They are the body without the soul. That word, country, comprehends within itself place and people, and all that history, tradition, language, manners, social culture, and civil polity, have associated with them. This wonderful combination of State and nation, which binds me to both by indissoluble ties, enters into the idea of my country. Its name is the United States of America. The States are an essential part of the name, and of the thing. They are represented by the starry flag, which their children have borne on so many fields of glory, the ever-shining symbol of one nation and many States. They are not provinces or counties, they are not principalities or dukedoms, but they are free republican States, sovereign in their sphere, as the United States are sovereign in theirs; and all essential elements of that one, undivided, and indissoluble country, which is dearer than life, and for which so many have died. As the State of New York would not be to me what it is, if, instead of the free, active Commonwealth, it were to subside into a principality or a province, so neither would the United States be to me what



they are, if, instead of a union of free States, they were to subside into a consolidated empire. For such an empire we have not borne the defeats and won the victories of this civil war.

I will here venture to call attention to an argument put forth with great force and ability by a learned gentleman, now deceased, Mr. Loring, who, I think, was the first to propose this mode of dealing with the South, and who has attempted to justify it in a pamphlet, which I have now before me, and from which I will read one paragraph. He says:

"The power to wage war upon a State in rebellion, for the preservation of the Union, is a constitutional power necessarily invested in the government, solely for that purpose, and limited for that necessity. It can not, therefore, be exercised for any other end, nor beyond the means justly and reasonably required for its accomplishment. It can not justify the holding of the territory of a State as conquered or as provinces, under military rule, or deprive them of the rights of civil government any further than may be necessary to enforce present obedience to the Constitution and laws, and for security against danger of future like disobedience and revolt."

That is the argument, in the best form in which it can be stated. Now, I take leave to say that this is full of fallacies. In the first place, there is no power to wage war against a State for the preservation of the Union. This is a misstatement of the proposition. The power to wage war is to overcome resistance to the execution of the Federal laws and the Federal Constitution, and that is all. You can not wage war against a State upon the abstract proposition that you are to preserve the Union. The Union takes care of itself when you execute its laws; and you execute its laws when you overcome resistance, and that is the only end for which you can begin or continue war. And, furthermore, what right have you to wage war for the purpose of obtaining security against the danger of future like disobedience and revolt? Is that a constitutional right? Let us put it to the test.

In 1860, when we saw, as clearly as men could foresee a future event, by the little cloud rising to darken finally the whole horizon, that war was coming, would it have been a constitutional exercise of power in the General Government to wage war upon the South? Have we ever had a President ready to do that, or a Congress ready to undertake it? Can you send armies

into a State of this Union for the purpose of guarding against the danger of future rebellion, and war against it? You may have your armies ready, may garrison your forts, and strengthen your outposts. That you can do, and ought to do; but you can not wage war. If you can, then we have no guarantees, for it will rest for ever in the discretion of Congress to order an army to make war upon a State, whenever it may determine that there is danger of something being done which ought not to be done.

A short time since, a proposition was made to take into the hands of the Federal Government the whole State of Maryland and the whole State of Kentucky, upon the ground that their people were disloyal in heart; that they did not mean sincerely to obey, and there was danger that hereafter they would give aid and countenance to a new rebellion. I deny most explicitly that this limited Government of ours has power to wage war against a State, upon any suspicion or theory of an intended insurrection against the Government. We are limited to our constitutional duties and our constitutional rights, which are to enact laws as authorized by the Federal Constitution, and to execute those laws by the courts of justice and the Executive arm.

Let it not be imagined for a moment that I have the least sympathy with the rebels. As I detested the rebellion, so do I censure those who rebelled. But, while I censure, I remember that they are still my countrymen, and, remembering also that rights and duties are correlative, as I would exact from them performance of the duties, so I would concede to them the rights of citizens. To close up the gaping wounds of civil war is the consummate art of statesmanship, and, if history teaches us aright, that end can never be accomplished by proscription. Conciliation is more potent than severity, and forgetfulness than the remembrance of wrongs.

These military governments of the South are said to be only temporary. How do we know that? Is it constitutional to do a thing as a temporary expedient which Congress may continue as long as it pleases? The conditions annexed to this first reconstruction act contemplated that the military power should remain in the South, until the amendment proposed should be

ratified by three fourths of the States. The argument of danger is an argument of very little force on either side.

It is not speaking too strongly to say that this Court stands now in the very gateway against the usurpation of military power dangerous to our liberty. What have we seen, and what do we now see? We have seen the Chief Justice of this Court, before whose robes all bayonets should be lowered, taking his place in a Circuit Court in North Carolina, after explaining to a committee of Congress that he would not hold his Court where it was not supreme over all military as well as civil officers, and receiving assurances of the subordination of the military, and, upon appearing, announcing to the bar as a reason why his Court had not been held at an earlier day, that it was beneath the dignity of a Court of the United States to sit where its process might be resisted by military power; and yet we have seen the execution of the process of this very Court forbidden by military officers! Of course, if the Chief Justice had taken his seat again upon that bench, he would have punished the offenders as they deserved. We have seen, in a printed document submitted to Congress, the testimony of the Secretary of War, asserting his belief that the decision of this Court in the *Milligan* case was erroneous; that it was not founded in law, though it was the unanimous decision of the Court; and maintaining still the right to establish military commissions in loyal States. We have seen an act pass through one House of Congress which proposes to vest in the General of the army unlimited control over all these eleven States; and we have also seen introduced into the Lower House an amendment to an appropriation bill, proposing to make your hall a place to be guarded by soldiers! Here is the proposition, which I will read: "Provided that from and after the close of the current fiscal year the police and protection of the Capitol building and grounds shall be under the direction of the engineer department of the army, and the Secretary of War shall detail for that service from the garrison at Washington such number of non-commissioned officers and privates, not exceeding forty, as may be deemed necessary for the purpose by the Chief Engineer; and soldiers, when so employed, shall have an extra allowance of twenty-five cents per day for privates, and thirty cents per day for non-commissioned

officers." If we go on as we thus begin, instead of these guardians at your door you will find soldiers with bayonets, and there will be soldiers with bayonets before the Houses of Congress. We must resist now! We will not have military government; it is against the Constitution, and we stand upon the Constitution of our country. We will not have it for an instant, for an instant's voluntary submission to unlawful power is dishonor. An instant may expand into a day, a day into a month, a month may lapse into years, and years into a generation. If we submit for a moment, we forget the lessons of our fathers, and despoil our inheritance.

We were threatened by the counsel that, if in New York we did not conform ourselves a little more diligently to what was required of us, we should have the General of the army there. One of them called it "that infernal city of New York." Pardon me if I repel the calumny. My city is misgoverned, I admit; but that misgovernment, be it remembered, comes chiefly from the premature admission to the suffrage of those not here accustomed to exercise it. Among her people are as much virtue, as much patriotism, as much honor, as exist anywhere. You, sir, when you came to a discredited Treasury, know how your hand leaned upon her, and how her merchants came forward with the most lavish offers to sustain this Government; how, at the first summons of the President, the flag of the country floated out from window and tower, and her people called with one voice, bidding loyal men to rise everywhere throughout the land. For social culture, for intellectual activity, for the magnificence of her commerce, for the grandeur of her enterprises, and, not least, for her abounding charities, she stands unapproached on this continent and unapproachable, even by that younger sister of the Pacific, through whose golden gate lies the highway to India. New York sits upon her island rock, and there is no American who, returning to his country, sees her spires above the waters, but rejoices in her prosperity, and is proud of her.

But we are told that this is a *political* question, which is beyond the competency of the Courts to determine. A fortnight ago this objection would have come with more force than it comes now. The experience of a few days has taught

many, what was understood by thoughtful observers before, that this Court is the great peace-maker, and that nothing but its peaceful interposition can prevent collisions of force.

What is a political question? Is it one which affects the policy of parties or is decided by partisan views? Such a question is the very one that is most likely to lead the legislative department into excesses, which it needs the judicial to correct. If Congress were to pass an act of attainder, with a purely political motive, or for a purely political end, does any one suppose that this Court is not competent to pronounce it unconstitutional and void? A political question, I apprehend, is one which the political department of the Government has exclusive authority to decide.

Is it a political question whether McCardle can be imprisoned by military order and tried by military commission? There are political questions, undoubtedly; that is, questions which the political department of the Government has a right to decide, and, being decided there, the Courts will follow. But whether or not a man can be imprisoned and tried by a particular tribunal is always a judicial question, which the Judges will determine for themselves. This question, however, has received its final answer in the opinion of this Court, delivered by Mr. Justice Nelson, upon the bill exhibited by Georgia against the Secretary of War and others; and it would be presumptuous in me to debate now what is there decided so satisfactorily to all friends of constitutional government, and so authoritatively for us all.

Finally, sir, may I not say that I have shown—

1. That there is no reason whatever for the proposition that Mississippi is not now a State of the American Union;

2. That not only is she a State of the Union, but her people have the rights of citizens of a State;

3. That whether she be or be not a State, or her people have or have not the rights of citizens of a State, that people can not be subjected to military government by the Congress of the United States; and,

4. That, therefore, the petitioner, McCardle, is entitled to his release from the military commission which presumed to sit in judgment upon him?

And when your judgment is pronounced, as I hope and pray it may be, in the petitioner's favor, it will, I trust, be the endeavor of all good men to promote by their counsel and example the acquiescence of the other departments of the Government. As it is your right, in the last resort, upon all cases that come before you, to give final interpretation to the Constitution, so it is the duty of all citizens to respect and accept your interpretation. There is no need to strain the authority of the Government. The constitutional amendment not only abolishes slavery and makes freedom the rule throughout the country, but it gives Congress the power to enforce that article by appropriate legislation, and to see that the freedom of every man, of every race and condition, is maintained.

It was the boast of an English orator and statesman, on a memorable occasion, when he delivered a message from the King to his faithful Commons respecting the expedition to Portugal, that "wherever the standard of England is planted there foreign domination shall not come." If we will firmly maintain the Constitution of our fathers, as modified by the great amendment, we shall be able to make it our higher boast that, where the standard of America is planted, there shall be neither foreign domination nor domestic oppression.

# CONSTITUTIONALITY OF THE ENFORCEMENT ACT.

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## THE CRUIKSHANK CASE.

1875.

CRUIKSHANK and two others were found guilty in Louisiana of conspiracy under the Enforcement Act of May 31, 1870. This act provided that "if two or more persons shall band or conspire together . . . to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony." It was charged against the defendants that they had conspired against citizens of African descent to intimidate them and prevent the free exercise of the right to vote "at any election to be thereafter had and held by the people" in the State of Louisiana. It was also charged generally that the defendants conspired to hinder persons of color "in their respective and several free exercise and enjoyment of the rights, privileges, and immunities, and protection granted and secured to them respectively as citizens of the United States."

The Supreme Court of the United States held that the charges were not explicit enough. Nearly one hundred persons were indicted at the April term (1873) of the Circuit Court for Louisiana, under the Enforcement Act. Eight of these appeared and three were convicted, including Cruikshank, but the Supreme Court reversed the decision of the Court below, and the prisoners were discharged.

If the Court please :

The argument that I shall have the honor to address to the Court will be confined to the question of compatibility between the Federal Constitution and the legislation of Congress, which is supposed to authorize the present indictment.

It is, indeed, true that, if the form of the accusation is not conformable to the Act of Congress, the defendants are entitled to be presently discharged ; but, inasmuch as a new indictment

might possibly be preferred, supposing the present to fail for defect of form, this question is insignificant compared with the other.

For my part, I shall leave the matter of procedure where it now stands upon the argument, and confine myself to the question of conformity or non-conformity of the Act of Congress to the Constitution. If the legislation upon which this indictment rests is conformable to the organic law of this country, then it matters little what is or is not decided about the forms of proceeding. The substance of American constitutional government, as received from the fathers, will have gone, and the forms will not be long in following.

Let us reduce and formulate the question, if we can, so as to separate the incidental from the essential, in order that our attention may be withdrawn from all other considerations than that of the one fundamental and permanent theory, upon which this legislation must stand, if it stand at all.

The thirteenth amendment to the Constitution (1865) declares that neither slavery nor involuntary servitude, except in punishment of crime, shall exist within the United States, and authorizes Congress to enforce the declaration by appropriate legislation.

The fourteenth amendment (1868), after defining citizenship of the United States, prohibits the States (1) from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; (2) from depriving any person of life, liberty, or property, without due process of law; and (3) from denying to any person within their jurisdiction the equal protection of the laws. And it authorizes Congress to enforce the provisions of the amendment by appropriate legislation.

The fifteenth amendment (1870) prohibits the States from denying or abridging the rights of citizens of the United States to vote, on account of race, color, or previous condition of servitude. This prohibition also Congress is authorized to enforce by appropriate legislation.

Professing to act under the authority of these amendments, Congress has passed five acts, four only of which were in existence at the time of the indictment now under consideration :



one, called the Civil Rights Act, passed April 9, 1866; the second, called the Enforcement Act, passed May 31, 1870; the third, amending this, passed February 28, 1871; and a fourth Act, passed April 20, 1871.

The Civil Rights Act is first in order of time. Section 1, after declaring that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States, enacts, that "such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none others."

Section 2 enacts that "any person who, under color of any law, statute, ordinance, regulation, or custom," shall cause any *inhabitant*—the word *citizen* being dropped—"to be subjected to the deprivation of any right secured or protected by this act," shall be guilty of misdemeanor.

Section 3 confers upon the Federal Courts jurisdiction over infractions of the act.

Sections 4 and 5 provide an army of officers to enforce the act.

Section 6 enacts penalties for obstructing or resisting the execution of the act.

The remaining sections, 7, 8, 9, and 10, are not material to the present inquiry.

The first section of the Enforcement Act declares that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections, without distinction of race, color, or previous servitude.

Section 2 provides that if, by the law of any State or Territory, a prerequisite to voting is necessary, equal opportunity for it shall be given to all, without distinction, etc.; and any person charged with the duty of furnishing the prerequisite, who

refuses, or knowingly omits, to give full effect to this section, shall be guilty of misdemeanor.

Section 3 provides that an offer of performance, in respect to the prerequisite, when proved by affidavit of the claimant, shall be equivalent to performance; and any judge or inspector of election who refuses to accept it shall be guilty, etc.

Section 4 provides that any person who, by force, bribery, threats, intimidation, or other unlawful means, hinders, delays, prevents, or obstructs any citizen from qualifying himself to vote, or combines with others to do so, shall be guilty, etc.

Section 5 provides that any person who prevents, hinders, controls, or intimidates any person from exercising the right of suffrage, to whom it is secured by the fifteenth amendment, or attempts to do so, by bribery or threats of violence, or deprivation of property or employment, shall be guilty, etc.

Section 6 provides that "if two or more persons shall band or conspire together, . . . with intent to violate *any provision of this act*," that is, of either act, "or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony," etc.

Section 7 provides that, if in violating any provision of sections 5 and 6 any other offense is committed, that shall be visited with such punishments as are prescribed for like offenses by the laws of the State.

Sections 8, 9, and 10 give jurisdiction to certain Courts, provide commissioners, and direct the execution of warrants, etc.

Section 11 provides penalties for preventing or obstructing the execution of the act.

Section 12 regulates the fees of officers.

Section 13 authorizes the President to employ the public forces.

Sections 14 and 15 relate to the holding of office by persons disqualified under the fourteenth amendment.

Section 16 enacts that "all persons within the jurisdiction of the United States shall have the same right in any State and Territory to make and enforce contracts, to sue, be parties, give

evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, licenses, and exactions of any kind, and none other," etc.; and that no tax or charge shall be imposed upon immigrants from one country not imposed upon immigrants from any other.

Section 17 enacts that any person, who, "under color of any law, statute, ordinance, regulation, or custom," subjects any inhabitant to the deprivation of any right secured or protected by section 16, or "to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens," shall be guilty, etc.

Section 18 reenacts the Civil Rights Act.

The remaining sections, 19, 20, 21, 22, 23, relate to elections, and construct a very large and complicated piece of machinery for their management.

The amendatory act, passed February 28, 1871, relates chiefly to elections of members of the House of Representatives; the provisions of which, and of the fourth act, however extraordinary, are not within the scope of our present inquiry.

By authority of this legislation, ninety-seven persons were indicted together in the Circuit Court of the United States for the District of Louisiana, and three of them, the present defendants, were found guilty upon the first sixteen counts. The indictment was found under the sixth and seventh sections of the Enforcement Act, sixteen counts being for simple conspiracy under the sixth section, and the other sixteen being for conspiracy, with overt acts resulting in murder.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten, and intimidate" two citizens of the United States "of African descent and persons of color," "with the unlawful and felonious intent thereby" them "to hinder and prevent, in their respective free exercise and enjoyment of their lawful right and privilege, to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose."

The *second* count avers an intent to hinder and prevent the exercise by the same persons of the "right to keep and bear arms for a lawful purpose."

The *third* avers an intent to deprive the same persons "of their respective several lives and liberty of person without due process of law."

The *fourth* avers an intent to deprive the same persons, of the "free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property" enjoyed by white citizens.

The *fifth* avers an intent to hinder and prevent the same persons "in the exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the said United States, and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color" of the said persons.

The *sixth* avers an intent to hinder and prevent the same persons in "the free exercise and enjoyment of the several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana."

The *seventh* avers an intent "to put in great fear of bodily harm, injure and oppress" the same persons "because and for the reason" that, having the right to vote, they had voted.

The *eighth* avers an intent "to prevent and hinder" the same persons "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured" to them "by the Constitution and laws of the United States."

The next eight counts are a repetition of the first eight, except that, instead of the words "band together," the words "combine, conspire, and confederate together" are used.

This indictment, or that portion of it upon which these defendants have been convicted, is supposed to be justified by the sixth section of the Enforcement Act, and that section is said to rest upon the late amendments. In considering the question whether it is or is not supported by them, I assume, what can not be disputed, that before the late amendments this section, and the same may be said of the other sections, would

have been beyond the competency of Congress. The point of contention, therefore, is whether the amendments have conferred the power.

Upon this, my first proposition is, that it was not the design of the people, in adopting them, to change the fundamental character of their Government, or to alter the relations between the Union and the States. They intended that the Union should continue to be what it had been before; to use the language, slightly changed, of the late Chief Justice, an indestructible union of indestructible States.

The events of the last fifteen years are no secret. The origin of the war, the war itself, the questions to which in its varying progress it gave rise, and its great results, are known of all men. It established the unity of the nation and the freedom of the slaves. Upon the final settlement, while it was not thought necessary to make any constitutional changes in respect to the claim of secession and the relation of the States to the Union, it was thought necessary to provide for the equality of the freedmen.

In doing this, two courses were open : one was, to place them and all their rights and relations under the cognizance of the Federal power; and the other was, to leave them as they were, under the cognizance of the States, but to provide that these should make no discrimination to their disadvantage. The latter course was adopted. The articles are congruous, and plainly adapted to that end. They all imply that, apart from the prohibitions, the States have plenary power over the subject, and they leave that power as it was, with the single qualification that it shall treat all alike, the emancipated slaves side by side with their old masters. It was in this respect somewhat like the treaty stipulation we often make, agreeing that the nation treating with us shall be put on the footing of the most favored nations, which, while it leaves us at full liberty to make what new treaties or enact what new laws we please, obliges us to grant to the one what we grant to the others.

It was the design of the amendments, and their whole design, to raise the freedmen to an equality with their late masters before the law, and to give the blacks all the rights

which the whites enjoyed. There was no complaint that the whites were oppressed. There was no mischief in that respect to remedy. They did not need new guarantees, and none were intended for them. The complaint to be relieved, the mischief to be remedied, the guarantee to be provided, had respect to the lately subject race, and to that alone. In saying this, we of course leave out of view the temporary provisions respecting the treatment of the rebels and the rebel debt. So understood, there is symmetry in the whole of the amendments; they are all conformed to one plan, and carry out one great purpose. Thus the thirteenth amendment decreed the emancipation of the slaves; the fourteenth gave them the privileges of citizens of the United States, and, to assure them equality of civil rights and debar for ever discriminating legislation to their oppression, forbade the States to deprive any person of the equal protection of the laws, or of life, liberty, or property, without due process of law; and, finally, the fifteenth amendment gave them equality of political rights, to the extent of an equal right to vote.

The general question now is, *What may Congress do to enforce the prohibitions* thus directed against the States? The particular question upon which this case depends is, whether, under color of enforcing the prohibitions, and before any State has violated them, Congress can anticipate and prevent their violation by taking into its own hands the regulation of the whole subject. ✓

The penal legislation upon which this indictment is founded, can be defended only on the assumption that Congress has in its keeping the various rights which the legislation aims to protect. The object of punishment is the prevention of crime, and crime is the violation of right. The United States can not punish the violation of State laws any more than the States can punish the violation of Federal laws. When the former assert their competency to punish violations of the right to assemble, the right to bear arms, the right to life, liberty, and property, the right to vote, the right to the equal protection of the laws, and the privileges and immunities of citizens of the United States, they assert their competency to enforce each and all of these rights, privileges, and immunities, and the competency to

enforce includes, of course, the competency to enumerate and define all that are enforced.

Such may be undoubtedly one way of accomplishing the object. You can prevent a thing being done in a manner displeasing to you by doing it yourself. Congress can prevent the States from making a wrong regulation by itself making all the regulations. But is that the fair purport of the authority? Is it the legitimate interpretation of a charter of Federal Government, by which power is carefully partitioned between the Union and the States, to say that, if the former has authority to prevent the latter from doing a *wrong* thing, it may prevent their doing *anything*, by doing *everything* itself?

It seems to me the more natural and convenient way of treating the subject to discuss, first, the general propositions, and then to apply them to the case in hand.

The prohibitions of these amendments of the last decade are reasonably clear; their general purpose is unmistakable; they are laid upon the States, and Congress has express power to enforce them by appropriate legislation. So much is indisputable. The dispute begins when the word *appropriate* is to be interpreted. What is, and what is not, appropriate legislation? And who is to judge of the appropriateness? These are the cardinal questions upon which hinges the decision of the present cause, and with it the determination, in no small measure, of the future of the country.

The first observation to be made is, that the amendments, being made part of the Constitution, are to be construed in connection with the original parts of it, and, according to the well-understood and long-established interpretation of that instrument, Congress is, *within certain limits*, the exclusive judge of the appropriateness of its legislation to the end designed; but that *there are such limits*, and beyond them Congress may not pass.

The rules of interpretation applicable to the Federal Constitution have not been in any respect changed by the amendments. The question is always, first, What is the natural sense of the language used; and then, if that be doubtful, what was the intention of the law-givers—that is, the people of the United States? In the natural sense is included not only that of the

particular provision under consideration, but the other provisions of the same institution. In short, when the question arises what legislation Congress may adopt to enforce the amendments, the answer that should follow is, that it must be *appropriate*, and must *not* be *prohibited* by other provisions of the Constitution, either *expressly* or *by implication*.

There are certain express prohibitions, which are so many qualifications of the powers granted, and there are also implied prohibitions. For example, Congress could not, under color of preventing a State from doing certain things, destroy the State, or any of its essential attributes. If it were proved, beyond question, that to-morrow the Legislature of Massachusetts, if not prevented by Congress, would pass a law denying suffrage to every colored man in the Commonwealth, Congress could not, by any legislation whatever, terminate the session of the Legislature, or authorize the President to march the garrison of Fort Warren into the State-House and turn the members out of doors. Congress *could not*, I say, do this. I do not confine myself to saying it would not; I say that, if it were so minded, it could not, and every respectable authority in the land—legislative, executive, and judicial—would so pronounce. Why could not Congress do this? let me ask. The answer is, that the State of Massachusetts is a self-existing and indestructible member of the American Union, and neither Congress nor any other department of the Federal Government has, expressly or by implication, power to destroy any essential attribute of the sovereignty of that Commonwealth. The word sovereignty I use in its American sense of supreme power, partitioned between the Union and each of the States. Neither the one nor the other is an absolute sovereign; each power is sovereign in its own sphere. The dividing line between them is as marked to the eye of a lawyer as if it were territorial.

Congress, then, is judge of the means to be chosen for attaining a desired end, only in this sense, that it must choose *appropriate* means, and such as are *not* otherwise *expressly* or *by implication* prohibited. Certain means are expressly prohibited, as, for example, the establishment of an order of nobility. Other means are by implication prohibited, as, for example, the destruction of a State. Congress is not expressly



prohibited from destroying a State; the implied prohibition, however, is not less real and imperative. After eliminating these prohibited means from the category of those which are eligible, there must be a still further elimination of all means which are not appropriate. This word *appropriate* is one of limitation. Congress is not clothed with power to enforce the prohibition by every kind of legislation, but by appropriate legislation. We have, then, in the very body of the Constitution, these limitations upon the choice of means by Congress; they must *not* be *prohibited*, and they must be *appropriate*.

When, therefore, it is said, as it often is, that Congress is the exclusive judge of the means to be chosen for attaining an end, the proposition is to be admitted only with the two qualifications that have been mentioned. So it was said by Madison, Hamilton, and Jay, in the "Federalist"; so it was said by Hamilton in his argument for a Bank of the United States; so it was said by Chief-Justice Marshall in *McCulloch vs. Maryland*; and so it has been said, scores of times since, by Judges of this Court and other Judges, State and Federal.

To illustrate the rule that no means can be adopted which contravene the implied as well as the express limitations of the Constitution, let us suppose a few cases. Congress could not authorize the criminal prosecution of a State legislator who voted for a bill within the prohibition. Why not? Because that would be incompatible with the independence of the State Legislatures, an independence essential to the sovereignty, or, if the expression is liked better, the partial independence or the autonomy, of the States. Congress could not authorize an injunction against a State Legislature, forbidding it to pass such a bill, for the like reason. Congress could not subject to criminal process the Judges of a State Court for deciding against the constitutionality of the Enforcement Act, and the reason here is the same.

There are many limitations upon the choice of means beyond those which are expressed. They are implied from the nature of the Government, the history of the country, and the traditions of the people. The right to declare an act invalid, because incompatible with the Constitution, applies with the same effect where the incompatibility relates to the implied,

as where it relates to the express, limitations of the Constitution.

General language, though in itself unambiguous, is limited by the circumstances in which it is used. Thus "the United States shall guarantee to every State in this Union a republican form of government." But what sort of a republican government? Is there any express provision of the Constitution which forbids Congress to establish in a State, whose authorities are overthrown, a government like that of Venice, or like that of another of the Italian republics of the middle ages? According to the classification of writers on government, Genoa under its doges, Florence under its dukes, and Poland under its kings, were republics. Why may not Congress take that form of republican government now existing in France, or that lately existing in Spain, or any of the republican forms of past ages—that, for instance, of the Commonwealth of England under Cromwell—or even that of Poland? There is no reason other than this, that there are certain essential, inherent, ineradicable principles of American republican government, to which the framers of the Constitution referred, and by which Congress is bound. And if Congress be thus limited, the Courts must say so, whenever the question is brought before them. What otherwise could prevent Congress from establishing in a disorganized State a government of military dukes?

In all that I have said I am justified by recent decisions of this Court. Not longer ago than 1868 this Court, speaking by its late Chief Justice, uttered these memorable words, which will live in constitutional history so long as the Constitution lives in its vigor: "Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national Government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*"\* And in 1870 the Court, speaking by Mr. Justice Nelson, used this language: "The

\* *Texas vs. White*, 7 Wall., 725.

General Government and the States, although both exist within the same territorial limits, are *separate and distinct sovereignties*, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but *the States, within the limits of their powers not granted*, or, in the language of the tenth amendment, 'reserved,' *are as independent of the General Government as that Government within its sphere is independent of the States.*"\* And again: "It" (the taxing power) "is therefore one of the *sovereign powers vested in the States* by their Constitutions, which remain unaltered and unimpaired, and in respect to which the State is as independent of the General Government as that Government is independent of the States. *The supremacy of the General Government*, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, *can not be maintained. The two Governments are upon an equality*," etc. (p. 126). And again: "In this respect, that is, in respect to the reserved powers, *the State is as sovereign and independent as the General Government*" (p. 127). The case itself is the strongest possible example of an implied limitation upon the powers of Congress. Its power to tax is apparently unlimited, and it had passed an act, by the terms of which the salary of a State Judge was liable to taxation, but this Court pronounced the act unconstitutional, because, in the exercise of an express power, Congress had transgressed the *implied* limitations. Other instances of implied limitations will readily suggest themselves: Federal Judges declining duties, not judicial, imposed on them by Congress, and State officers declining Federal duties.

The only principle that can justify the legislation now in question, if it be justifiable at all, is this: that, in the choice of means to prevent a State violating the prohibitory clauses of the late amendments, Congress may itself do the things which the State would otherwise have done, in order to make sure that they are not done improperly. The States may, every one of them, do what New York and Massachusetts now do in securing the right of all citizens to vote, without regard to race,

\* *Collector vs. Day*, 11 Wall., 124.

color, or previous condition of servitude; but, for fear that they will not continue to do so, Congress may, it is claimed, register the voters and receive and count the votes. And if it may do that, it may do any other thing that is to be done by a Government in an election; in short, take upon itself to construct and work the whole machinery of elections. And what is true of voting is, as I shall endeavor to show more fully hereafter, true also of every other subject within the scope of these amendments, and that includes almost every subject of government. For what is there in the world for State legislation but "life, liberty, and property," and the "protection of the laws"? If the validity of the present legislation is affirmed, one may affirm the validity of legislation upon any subject concerning life, liberty, property, and protection by the law. ✓

It is idle to answer that such an attempt will never be made. Who can tell what, in the frenzy of future parties, may not be attempted? Who that has seen the things happening in this generation can foretell what may not be done or attempted in some of the times to come? One of the most extraordinary phenomena of political history is the tendency of majorities to oppress minorities, and to trample upon all obstructions standing in the way. It would have been thought probable that, as each person, who helps to make the majority, is himself but an individual, and may soon be in the minority of individuals, he would be sedulous to guard his own rights, by refusing to join in pressing too heavily upon the rights of others. But the fact is different, though every Federal legislator and every other Federal officer does in truth depend for his own protection and that of his family, more upon the State to which he belongs than upon the Federal Government which he for the time being serves. Yet this truth is lost sight of in the thoughtlessness and excitement of national discussions. Whoever has carefully watched the political events of the last decade must have seen a constant and constantly accelerated movement toward the organization and accumulation of Federal authority. This has been brought about by the action of good men as well as bad, in obliviousness of the truth that every new power added to the nation is just so much subtracted from the States.

A political argument addressed to the Supreme Court would of course be out of place. Its great but single function is to interpret the law and the Constitution, be the consequences what they may. But it is proper to reflect that, for the true interpretation of language, we may and should look at the occasion and circumstances in which it was used. This is both natural and philosophical. The imperfection of language leaves room for different interpretations, in the choice of which we put ourselves, so far as may be, in the place of those who used it, see with their eyes, hear with their ears, and imagine ourselves to be aiming at that at which they aimed. We know the history of the Federal Constitution, and we know also the history of the late amendments. The latter is too fresh for us to be ignorant of the views and intentions of those who ratified their provisions. We may appeal to the knowledge of men around us, to our fellow-citizens of the whole nation, to bear us out in the assertion that the people did not suppose they were thereby changing the fundamental theory of their government. If this be assumed, and it be shown that the legislation in question goes upon a new theory of the Government and of the relation of the States to the Union, then it is shown that the people never contemplated, and much less sanctioned, such an interpretation of their acts. Should this be done, then, in a case where language is susceptible of two interpretations, that one is to be preferred as the true one which conforms to the understanding of the people, whose acts alone these amendments are.

My argument, therefore, will consist of an endeavor to establish the two following propositions:

I. The natural interpretation of the language of the new amendments does not justify the present legislation;

II. If the natural interpretation did justify it, yet, as the language is susceptible of a different one, the latter must be preferred as that alone in which it was understood by the people.

*The natural interpretation of the amendments does not justify the legislation.* No State (this is the language) shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property, without due process of law, or deny to

any person within its jurisdiction the equal protection of the laws; no State shall deny or abridge the right of citizens of the United States to vote, without regard to race, color, or previous condition of servitude. A State is a corporate body, and can act only by its corporate authorities. Until these corporate authorities have acted, the State has not violated the prohibition. Congress, therefore, must move *after* the State, not before it. But as yet no State has moved, so far as we are informed. Not one of them has done anything which a State is, by these amendments, commanded not to do.

The prohibitions being against State action, *that action must precede any counter-action* under Act of Congress. This is so obvious as to amount almost to a truism. Even if Congress should be supposed competent to legislate in anticipation of State action, nothing could be done under the act of Congress until something had been done under the act of the State, contrary to the prohibition.

It follows from the last proposition, as well as from other considerations, that in respect to the mere prohibitions upon the States no action under a law of Congress can be had for the mere *inaction* of a State. If, for example, a State should wholly fail to provide for certain rights of property, Congress would not thereby become authorized to pass laws for the protection of such rights. There are many rights which Courts acting only according to the common law can not adequately protect. Massachusetts and Pennsylvania were formerly without equitable remedies. If they were so now, no sane man would pretend that therefore Congress would be authorized to establish such remedies for them. So, too, in respect to certain new rights of property, as, for instance, those which arise out of telegraphy, should a State or all the States fail to define and protect them, Congress could not do so.

Failure to provide a remedy for a wrong is not the same thing as depriving of a right. If it were so, then Congress might examine the codes of the States, and, if it found their provisions inadequate, might supplement them. Were a State to repeal a part of its laws for the protection of rights or the punishment of crimes, the national Government could not supply the deficiency. Thus, if New York were to repeal all laws

for the collection of debts, Congress could not reenact them. If Massachusetts were to provide no punishment for conspiracy or embezzlement, Congress could not provide it.

It could hardly be claimed that these prohibitions require any more of the State Legislatures than would have been required of them if the same had been contained in their own Constitutions. Then surely their doing no more and no less can not give just occasion for Federal interposition. *State inaction, therefore, is no cause for Federal action.* There must be affirmative action by a State tending to deprive a citizen of his rights before Congress can interfere. Should a State Legislature attempt to deprive a person of property without due process of law, its action would be a nullity. What, in that event, might Congress do? Provide legal means for establishing the nullity. What legal means did Congress, long ago, provide for establishing the nullity of an *ex post facto* law, or a law impairing the obligation of contracts, or a bill of attainder? An appeal to the Federal Courts. Has not that proved adequate? The whole question may be stated in these words: *How may Congress enforce the nullity of a State law?*

Guarantee is not the converse of prohibition. The prohibitions do not amount to guarantees. They do not require the States to make sure that no man shall be deprived of life, liberty, or property without law. The prohibitory amendments act upon the States and not upon individuals. Because the States are interdicted from certain things, and Congress may enforce the interdict, that does not prove that Congress may do the converse things. Because the States are prohibited, it would be a strange inference that Congress is authorized. When the Constitution says to the States, *You shall not*, that is not the same thing as saying to Congress, *You shall*, or, *You may*. If it were so, there would be found a strange omission in the Constitution, wide enough to let in many of the mischiefs which the prohibitions were intended to remedy. Congress is not by these amendments prohibited; it is only the States which are. If in consequence of the prohibition upon the States, Congress can exercise plenary power over the subject, it can do some, indeed, many, of the very things which the States were forbidden to do. Congress is not forbidden to

pass a law abridging the privileges and immunities of citizens, or denying to certain persons the equal protection of the laws.

But suppose a State, not content with its present laws, to be about to act aggressively, and thus to violate the prohibition, we may speculate upon what Congress could, in that event, enact. *The means adopted must be appropriate, and not prohibited.* The Federal Legislature can act only by statute, to be put in execution by the Executive and the Courts. Could Congress authorize the Executive to do anything against the recalcitrant State? It is difficult to see what it could empower the President to do. It must act through the Courts. And the only question is, What appropriate action could Congress authorize to be taken in the Courts to enforce the prohibition, that is, to prevent or redress *the violation*? Could it indict and punish the individuals who had taken advantage of the State's violation of the prohibition, or take action against the State authorities, or nullify the acts, which the State ordains and permits? Direct action against the State authorities is out of the question, for reasons hereinbefore and hereafter stated. For Congress to punish individuals for violation of State laws is also out of the question. To punish them for obeying the State laws would always be of doubtful expediency, as leading to unnecessary conflict, and would often be unconstitutional. The third remedy is the true if not the only one, to *nullify* the action which the State should not have ordained or permitted.

We have lived now three quarters of a century under the Constitution, and it has not been thought necessary to apply to Congress for the punishment of a conspiracy to impair the obligation of a contract, or to pass an *ex post facto* law, or a bill of attainder. No one seems to have thought that Congress was competent to punish such a conspiracy, or that there was any occasion for such legislation, if it were possible.

Equality before the law is the general aim of the amendments. That is secured by nullifying inequality, that is, for example, by declaring that whatever the State grants to its white citizens shall for that reason be also the right of the black. This rule would execute itself in most cases. Take that clause of the fourteenth Amendment which forbids a State to make or enforce a law abridging the privileges and immunities of citizens



of the United States. The State can not enforce a law until it is made ; if, therefore, it makes no such law, the condition on which alone Congress can act has not arrived. When the State has made such a law, then Congress can take steps to enforce the prohibition. What may they be? Not the passing of an act to declare the State law null—that has already been done by a power higher than Act of Congress, that is, the Constitution itself ; not by empowering the President to act, for he can not use force against a State statute, but by protecting the individual aggrieved from the operation of the obnoxious law. How is that to be done? Just as Congress has hitherto protected an individual aggrieved against an *ex post facto* law, or a law impairing the obligation of contracts. It is not necessary to go into details. Various legal processes will readily suggest themselves to a lawyer, the effect of which will be to protect the person from any law aiming to abridge his privileges or immunities as a citizen of the United States, whatever they may be.

Take the next clause, that which forbids a State to deprive any person of life, liberty, or property without due process of law. Upon this the same observation may be made. It is difficult to imagine any proceeding of a State to deprive a person of life, liberty, or property, which may not be effectually reached by the means suggested. One of the most powerful instruments for depriving a person of life, liberty, or property, is a bill of attainder, or a bill of pains and penalties. This is prohibited by the original Constitution. Is not that prohibition adequately enforced by existing Acts of Congress, allowing an appeal to the Federal judiciary?

Then take the third clause, that which forbids a State to deny to any person within its jurisdiction the equal protection of the laws. Can not this be dealt with in the same way? A denial in words only, though in the form of a State statute, would be harmless. If the denial is followed by acts, the person aggrieved can be defended against them by the same machinery of the courts, which would be sufficient for his defense against a violation of either of the preceding clauses. Indeed, the mode of dealing with the prohibition against bills of attainder is marked out as the true mode of dealing with the other

prohibitions. No act of a State could be more violent and aggressive than a bill of attainder, and, if the machinery of the twenty-fifth section of the Judiciary Act has hitherto been sufficient to defend the citizen against that, it surely will be sufficient to protect him against whatever is less violent and aggressive.

Will it be said that life, liberty, and property can not be protected without law; that the equal protection of the laws presupposes the existence and enforcement of laws, and that if the States do not make the laws, or, being made, do not enforce them, then Congress may interfere? I have already said something on this head, and will add only a few words.

Let the question be put in this form: Suppose a State not to provide adequate remedies for the protection of life, liberty, and property, what may Congress do? The answer must be, Congress may do nothing whatever, beyond providing judicial remedies in Federal Courts for parties aggrieved by deprivation of their rights. Beyond this there is no alternative between doing nothing or doing everything, between leaving the States alone or destroying them altogether. Congress can not do everything, because that would be the annihilation of the States; therefore it can do nothing, beyond providing the judicial remedies here indicated.

For want of a better expression, I will call affirmative legislation that which declares and enforces substantive law; and negative legislation, that which operates by way of defense, in giving redress to a party aggrieved. Using the expression in this sense, I should say that affirmative legislation in respect to the prohibitions of the fourteenth amendment is not within the competency of Congress. I see no middle ground between giving Congress plenary power over the subject of these fundamental rights, and giving it none. If a State were to abrogate its whole civil and penal code, can Congress make one for it? By neglect of the government of New York, we will suppose A to be deprived of his property without due process of law. His remedy is to sue in the State Courts. If that remedy is denied, he can go into the Federal Courts by appeal. Should the present process of appeal prove too dilatory or cumbrous, Congress can afford an adequate remedy, by providing a simpler and speedier appeal.

Then let us consider the prohibition of the fifteenth amendment : "The right of citizens of the United States to vote shall not be denied or abridged by . . . any State, on account of race, color, or previous condition of servitude," and Congress may enforce the provisions of this article. It might seem, at first sight, that here is a declaration of the right of citizens of the United States to vote, but that would be an error. No *right* is guaranteed or asserted. *Discrimination* only is prohibited. The right or privilege, whichever it may justly be called, of the elective franchise is still where it has always been, under State control, with this single qualification, that, in determining it, the State shall make no distinction on account of race, color, or previous condition of servitude.

This amendment is nothing but a prohibition, like the first section of the fourteenth article, and should be dealt with in the same manner. But the right or privilege of voting can not be exercised without affirmative legislation, it may be said. No more can the right to property be exercised without affirmative legislation. Because a judge of election refuses my right to vote, is that a reason why he should be indicted in the Federal Courts any more than the Judge of a police court, who refuses my claim for redress against a ruffian who has assaulted me in the street? Because individuals, bad men, band together to deprive me of my redress from the police magistrate, is that a constitutional reason why the Federal judiciary should be called upon to indict, try, and punish them? As individuals they have violated the State laws, and the State must take them in hand; if the State will not, the inhabitants of the State are the sufferers, and in their hands lies the power of redress; let them not call on Congress to help those who can help themselves.

It must never be forgotten that the Judges and other officers of all the States are sworn to support the Constitution. The cases have hitherto proved rare in which they have failed justly to interpret, and firmly to enforce, the provisions of the Federal Constitution, and there is no reason to suppose that they will be less faithful hereafter. There should seem, therefore, to be no occasion for attempting to bend the Constitution till it snaps asunder.

My proposition, in short, is this, that an act of a State in

violation of the prohibitions of the amendments would be a nullity, and that Congress, being authorized to enforce the prohibitions by appropriate legislation, the natural, the true, and the only constitutional mode of enforcement is by judicial remedies to establish and enforce the nullity.

The prohibitions of the three amendments present in effect a body of law complete in itself, comprehensive like a law of the Twelve Tables, and being the only *substantive law* in that respect required or permitted on the part of the United States. All that Congress has to do, by way of legislation, is to provide the means for the Courts to enforce the *nullity of the prohibited acts*, if any such are passed by the States; in other words, to prevent their *taking effect*. That legislation Congress has, in great part supplied, by the act just passed, April 3, 1875, by which a few words have been inserted in the body of that section of the Judiciary Act of 1789, which conferred jurisdiction upon the Circuit Courts, and giving them hereafter cognizance of suits of a civil nature "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority." The questions arising under the prohibitions of these amendments are, like the questions arising under the prohibitions of the original Constitution, judicial in their character. Congress is not competent to decide them, any more than it is competent to decide what are *ex post facto* laws, or what laws impair the obligations of contracts, or what are bills of attainder.

The sixth section of the Enforcement Act assumes that Congress has power to punish a conspiracy to deprive any citizen of the United States of his right to vote, of any right granted or secured by the Federal Constitution, of any privilege or immunity of a citizen of the United States, of the right to life, liberty, and property, and of the right to the equal protection of the laws.

Let us take one of these, and direct our attention to that; for example, the right of property. The prohibition of the fourteenth amendment commands a State not to *deprive* any person of property without due process of law. The State may deprive a person of his property by due process of law, but not without it. To deprive without due process is to pro-

ceed without law, by arbitrary acts of legislation, miscalled law. The State can act only by its corporate officers, and then only in pursuance of State legislation. If a State Governor despoils a citizen, he is a simple trespasser, unless there be a State law to justify him. We will suppose, then, a State law, prohibited by this amendment, which law authorizes a certain thing to be done; it is the doing of this thing which Congress may nullify. Suppose an act declaring that A shall have a farm belonging to B. This would be simply void. If not so declared by the State Courts, the Federal Courts on appeal would reverse their decision. That would be all that need be done. Suppose that certain tenants in New York conspire to deprive, by force, a citizen of that State of his rights as landlord. That is a conspiracy to deprive a person of his property without due process of law. May Congress enact a general law for the punishment of the conspirators in a Court of the United States?

We must discriminate among the prohibitions between those which aim merely at equality and those which aim at other rights. The provision about the right to vote, without disparagement arising from race, confers no right of voting; but simply provides that, if the right be given to whites, it shall be given to blacks also. Had a similar expression been used in respect to the right to hold office, it surely would not have been said that a right to an office was conferred. So if the right to education had been mentioned in the same terms, that would not have been construed to confer the right to be educated.

Upon the whole, it is submitted that the amendments, *taken in their natural sense*, do not justify the legislation now under review.

We come now to the second proposition, which is, *that if the interpretation contended for were not the more natural one, yet it is at the very least a possible interpretation, and is to be preferred*, because it is the only one conformable to the understanding and purpose of the people, by whom the text was adopted.

The general doctrine up to the time of these amendments continued to be, that the States were sovereign over their own

State concerns. This complex government was curiously contrived to give liberty and safety to the people of all the States. It was fashioned by the people, in the name of the people, and for the people. Its aim was to keep the peace among the States and to manage affairs of common concern, while it left the States the entire management of their own affairs. Its founders were wise and practical men. They knew what history had taught, from the beginning of Greek civilization, that a number of small republics would perish without federation, and that federation would destroy the small republics without such a barrier as it was impossible to pass. Liberty and safety were the ends to be won by the double and complex organization—liberty from the States, and safety from the Union; and the founders thought that they had contrived a scheme which would make the States and the Union essential parts of a great whole; that they had set bounds to each which they could not pass; in short, that they had founded “liberty and union, one and inseparable.”

No man in his senses could have supposed, at the formation of the Constitution, or can now suppose, that a consolidated government, extending over so much territory and so many people, can last a generation without the destruction of the States and of republican government with them. History is a fable, and political philosophy a delusion, if any government other than monarchical can stretch itself over fifty degrees of longitude and half as many of latitude, with fifty millions of people, where there are no local governments capable of standing by themselves and resisting all attempts to imperil their self-existence or impair their authority. The moment it is conceded that Washington may, at its discretion, regulate all the concerns of New York and California, of Louisiana and Maine; that the autonomy of the States has no defense stronger than the self-denial of fluctuating Congressional majorities—at that moment the republic of our fathers will have disappeared, and a republic in name, but a despotism in fact, will have taken its place, to give way in another generation to a government with another name and other attributes.

Observe how far on that road the maintenance of the present legislation will carry us. It has already led to *Kellogg vs.*

Warmouth, *United States vs. Clayton*, and *Harrison vs. Hadley*, and these cases are but a foretaste of what we may have hereafter. Its essential principle is that, in order to anticipate and prevent a violation of the prohibitions, Congress may establish a system of law for the general regulation of all subjects within the scope of the amendments. The logical and inevitable conclusions from this new theory are that the prohibition against denying or abridging the right to vote on account of color, race, or previous condition of servitude, may be enforced by framing and working the machinery of elections, no matter what may be the office or the function to be filled by the electors. The prohibition against making or enforcing any law abridging the privileges or immunities of citizens of the United States may be enforced by framing a code of these privileges and immunities, defining the methods of enjoyment, and providing penalties for their violation. And the still more comprehensive prohibitions against depriving any person of life, liberty, or property, without due process of law, or denying to any person the equal protection of the laws, may be enforced by a more comprehensive code, defining the rights of life, liberty, and property, in all their ramifications, the processes of law which are to be deemed due, that protection of the laws which is to be considered equal, and the various modes of enforcing the rights of life, liberty, and property by remedies civil and criminal. If these numerous and multiform provisions would not cover the whole ground of law, substantive and remedial, it is not easy to see what would be omitted that is contained in the most comprehensive existing code. The legislation of Congress would, of course, supersede or exclude legislation by the States upon the same subjects; the United States would stand as the universal lawgivers of the country, and the laws of the States would dwindle to the dimensions of corporation ordinances or the regulations of county supervisors. The argument appears to be unanswerable that such was not, and could not have been, the intention of the American people, in sanctioning these amendments, and, therefore, they should not be thus interpreted, even if the natural significance of their language were, as it is not, favorable to such an interpretation.

To suppose the contrary is to suppose that the people of

this country have forgotten all their history and all their traditions, and have come to regard as evil that which their fathers accounted good, and good evil. If Washington, when he left the chair of the Convention and signed his great name to the draft of the Constitution as President and deputy from Virginia ; if Franklin, when he uttered there his last words, and, looking at a picture of the sun in the horizon, said he had been in doubt whether it was rising or setting, but then, as they had so auspiciously concluded their labors, he knew it was the rising sun ; if those patriot fathers had been told that the time would ever come when the proud commonwealths which they represented would be accounted the vassals of that Union, which they were so sedulous to create and so strenuous to defend—they would have turned upon the utterers of such prophecies as fomenters of discord and enemies of the States.

If confirmation of these views of the Constitution were needed, it would be found in the interpretation, legislative, executive, and judicial, heretofore at all times given. We find that, with few exceptions, the current is all one way. The original instrument contained prohibitions that "no State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make anything but gold and silver coin a tender in payment of debts ; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility." These prohibitions have subsisted now for nearly ninety years, but Congress has never attempted to enforce them, except by the twenty-fifth section of the Judiciary Act of 1789, which gave an appeal to the Supreme Court, from the State Courts, upon Federal questions, and this action of Congress has proved all-sufficient.

As to the executive department, although it is made the duty of the President to recommend to the consideration of Congress "such measures as he shall judge necessary and expedient," there has never been, so far as I am aware, any executive recommendation of further legislation to enforce these prohibitions. As to the judicial department, we have a concurrence and weight of authority that leaves no room for doubt as to its views of the power of Congress.



Though this Court, in every period of its history, has had occasion to interpret the Constitution, and to declare the rules by which it is to be interpreted, we have little occasion to go further back than the last two years for an exposition of those rules, and their effect, especially upon the last three amendments. In the Slaughter-House cases, the Court declared that any question of doubt concerning the true meaning of the amendments can not be safely and rationally solved without a reference to the history of the times, and that—

“In any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which . . . was the prevailing spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

“It would be the vainest show of learning to attempt to prove, by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

“All this and more must follow, if the proposition of the plaintiffs in error be sound, for not only are these rights subject to the control of Congress, whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and most useful functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this Court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify

such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment.

"The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other, and of both of these Governments to the people—the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the Legislatures of the States which ratified them. . . .

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them, was the evil to be remedied by this clause as a class, and by it such laws are forbidden.

"If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But, as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in the Courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

"In the early history of the organization of the Government its statesmen seem to have divided on the line which should separate the powers of the national Government from those of the State governments; and, though this line has never been very well defined in public opinion, such a division has continued from that day to this.

"The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense

of danger at that time from the Federal power. And it can not be denied that such a jealousy continued to exist with many patriotic men until the breaking out of our late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for the determined resistance to the General Government.

"Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong national Government.

*"But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in these amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation."*

These extracts from the opinion of the Court, delivered by Mr. Justice Miller, are given at such length, because they are so important in themselves, and dispose of so many of the questions in the present case.

Of the three dissenting opinions, two certainly, and perhaps the third, properly understood, contain nothing in conflict with what is here stated. The difference of views among the learned Judges of the Court was upon the *extent* of the prohibitions, not upon the means of enforcing them.

If the thirteenth and fourteenth amendments be understood and applied, as it is here insisted they should, they will prove most beneficent in results. The prohibitions upon the States are merely such as every State Constitution should contain for its own Legislature. It is only when the interference of Congress is invoked that the danger begins, and that will cease so soon as it is understood that Congress can not act until the States have legislated in violation of the prohibition, and then only by way of nullifying their action through the Courts.

I have heard it argued that, as allegiance and protection create mutual obligations, all who have been made citizens of the United States by the late amendments are entitled to the

protection of the United States. So they are, but that does not prove the constitutionality of the present legislation, and for two reasons : The first is, that all the citizens of the States were also citizens of the United States before the amendments,\* and the effect of the new definition was merely to increase the *number* of citizens, but not their *rights*. That protection of the Federal Government which the whites could not have claimed before, the blacks can not claim now. The second reason is, that the allegiance and protection of the Union are qualified by the allegiance and protection of the States. The same person is a citizen of both, owes allegiance to both, and may claim the protection of both. Each is his sovereign to a certain extent. When, therefore, a citizen of the United States claims the protection of the United States, the first inquiry should be, against what, and in what manner, the protection may be given. He can not be protected against the lawful act of his own State, nor can he be protected against its unlawful act, except in the manner sanctioned by the Constitution of the United States. Who are citizens, we learn from one part of that instrument ; their rights and duties from another.

I must here close my part of the discussion. The general claim on the part of the Federal Government is nothing more nor less than this : that Congress is clothed with authority to *punish in Federal Courts any persons* for agreeing together in intention to prevent or hinder the free exercise and enjoyment by *any citizen* of *any right* or privilege granted or secured to him by the Constitution or laws of the United States, these laws being not only the three statutes just mentioned, but all other existing statutes, revised and not revised, and all statutes which Congress may choose hereafter to pass. And it seems to be assumed, furthermore, that the mere mention in the Constitution of a right, is the same thing as granting or securing it, and that whether the mention is made in the old amendments, containing prohibitions upon the United States, or in the new, containing prohibitions upon the States. This is an assertion of absolutism or legislative omnipotence amazing to contemplate.

\* Passenger cases, 7 How. 492, and Slaughter-House cases, 16 Wall., 72.

The particular claim in the present case is authority to punish an agreement between two or more persons, to prevent or hinder the free exercise and enjoyment by *any citizen* of the *right to the equal protection of the laws*, the *right to life, liberty, and property*, unless deprived thereof by due process of law, the *right to vote*, without regard to race, color, or previous servitude, *the right to meet others in assembly*, and *the right to keep and bear arms*. This is the claim in the present case, reduced to its strictest limit. It includes, of course, as has been already said, the power to *define* what is the right to the protection of the laws, what is the right to life, liberty, and property, what is due process of law, what is the right to vote, what is the right to keep and bear arms, and what is the right of assembly. It would be a logical inconsistency to pretend that a government can clothe its courts with authority to punish for crime, without authority to say in what that crime consists. When the Constitution gave Congress power to *punish* piracies and felonies on the high-seas, and offenses against the laws of nations, it gave also the power to *define* them.

The mere agreement or conspiracy, without any overt act, is the crime, unless the "or" in the second member of the sentence of the sixth section of the Enforcement Act is to be read as if it were "and." It may not be out of place to observe that an accusation of conspiracy is of all accusations the most dangerous to meet, and the easiest to make men believe, in an excited community. It is the harshest engine of tyranny ever used under the form of law; and its frequent use is the strongest evidence of misgovernment. From the bloody days when the compassing or *imagining* the death of a king was the miserable pretense, upon which tyrants took the lives and confiscated the estates of their victims, to the present hour, no surer proof of good or evil government can be found than the chapter on conspiracies in the statute-book of a country. One has but to compare the statutes of well-governed Connecticut with the statutes of misgoverned Ireland, to learn what an odious engine of oppression is the law of conspiracy. And what an abundance of materials for the supply of this engine are furnished by these Acts of Congress! If two magistrates, being convinced by counsel, decide that some of their provisions are

invalid, or, if two counsel in consultation come to that conclusion and so advise their clients, do they not put themselves in peril of the penalties denounced by the acts? If two Judges of a State Court, after painstaking deliberation, decide that a statute of their State, though in conflict with some portions of the Enforcement Act, is nevertheless valid, or even if, without deciding, they agree so to decide, are they not liable to be sent to the penitentiary, under the sixth section? Would not the sixth and seventeenth sections send to prison the Judges of California who decided in favor of sending back the Chinese women?

It is difficult to speak in guarded language of the pretensions upon which this legislation rests. It is a relief to think that they are here to be tested by the Constitution of the country, without the disturbing influence of party; by that Constitution which is above all parties, and which was made, not for the use of partisans, but for the safety and happiness of the whole people, and not for one, but many generations.

The first two words of the national motto are as much a part of it as the last. They have never been changed since their use began. They have been borne in every battle, and on every march, by land or sea, in defeat as in victory. They are still blazoned on our escutcheon, and copied in every seal of office. You will find them on all your commissions. May that motto never be mutilated or disowned! It should be written on the walls of the Capitol and of every State-house. I would wish it written on the ceiling of this chamber, that, upon every turning of the face upward, the eye might behold it. Its three words contain a faithful history; may they abide for ages, pledges of the future, as they are witnesses of the past!

## APPENDIX.

The following are referred to in connection with the *Cruikshank Case*:

EXTRACTS FROM AUSTIN'S LECTURES ON JURISPRUDENCE, Vol. I, p. 413.

"EVERY duty is a duty to do or forbear. A duty is relative, or answers to a right, where the sovereign commands that the acts shall be done or forborne toward a *determinate* party *other* than the obliged. All other duties are absolute."

(p. 417.) "*All* offenses affect the community, and *all* offenses affect individuals. But, though all affect individuals, some are not offenses against *rights*, and are, therefore, pursued of necessity criminally. That is to say, they are pursued directly by the sovereign, or by some subordinate representing the sovereign.

"Where the offense is an offense against a right, it *might* be pursued (in all cases) either by the injured party or by those who represent him. But, for reasons which I shall explain at large when I arrive at the distinction in question, it is often thought expedient to convert the offense into a crime. That is to say, the pursuit of it is not left to the discretion of the injured party or his representatives, but is assumed by the sovereign or by the subordinates of the sovereign. The difference between crimes and civil injuries is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party, or his representative, is a civil injury. An offense which is pursued by the sovereign, or by the subordinates of the sovereign, is a crime.

"In many cases (as in cases of libels and assaults) the same offense belongs to both classes. That is to say, the injured has a remedy which he applies, or not, as he likes; and the sovereign reserves the power of visiting the offender with punishment.

"That the distinction should have been referred to supposed differences of tendencies is wonderful. For, in different countries, the line between civil and criminal is utterly different. In almost all rude societies, the domain of criminal law is extremely narrow; and, for reasons which I shall show hereafter, it generally enlarges as society advances. The distinction does not consist in this: that the mischief of crimes (as a class) is more extensive than that of civil injuries as a class; but in this: the different tendencies of civil or criminal procedure, as applied in certain cases."

(p. 517.) "And, first: sanctions may be divided into *civil* and *criminal*, or, changing the expressions, into *private* and *public*. . . .

"Viewed from a certain aspect, all wrongs and all sanctions are public. For all wrongs are violations of laws established, directly or indirectly, by the sovereign or state. And all sanctions are enforced by the sovereign or by sovereign authority.

"But in certain cases of wrongs which are offenses against rights, or, changing the expression, which are breaches of relative duties, the sanction is enforced at the instance or discretion of the injured party. It is competent to the determinate person immediately affected by the wrong to enforce or remit the liability incurred by the wrong-doer.

"And, in every case of the kind, the injury and the sanction may be styled *civil*, or, if we like the term better, *private*.

"In other cases of wrongs which are breaches of relative duties, and in all cases of wrongs which are breaches of absolute duties, the sanction is enforced at the discretion of the sovereign or State. It is only by the sovereign or State that the liability incurred by the wrong-doer can be remitted. And, in every case of the kind, the injury and the sanction may be styled *criminal* or *public*. . . .

"In short, the distinction between private and public wrongs, or civil injuries and crimes, would seem to consist in this:

"Where the wrong is a *civil injury*, the sanction is enforced at the discretion of the party whose right has been violated. Where the wrong is a *crime*, the sanction is enforced at the discretion of the sovereign. And, accordingly, the same wrong may be private or public, as we take it with reference to one or to another sanction. Considered as a ground of action on the part of the injured individual, a battery is a civil injury. The same battery, considered as a ground for an indictment, is a crime or public wrong."

(p. 522.) "Besides this principal distinction, there are other species of sanctions requiring notice. Laws are sometimes sanctioned by nullities. The Legislature annexes rights to certain transactions (for example, to contracts), on condition that these transactions are accompanied by certain circumstances. If the condition be not observed, the transaction is void, that is, no right arises; or the transaction is voidable, that is, a right arises; but the transaction is liable to be rescinded, and the right annulled. Whether the transaction is void or voidable, the sanction may be applied either directly or indirectly. The transaction may either be rescinded on an application made to that effect, or the nullity may be opposed to a demand founded on the transaction. An instance of the first kind is an application to the Court of Chancery to set aside the transaction; an instance of the second is afforded by a defendant who opposes a ground of nullity to an action at common law. The distinction in English law between void and voidable is the same as that in the Roman law between null *ipso jure* and *ope exceptionis*. The first conferred no right; the second conferred a right which might be rescinded or destroyed by some party interested in setting it aside."

EXTRACTS FROM THE LETTER OF ROGER SHERMAN AND OLIVER ELLSWORTH TO THE GOVERNOR OF CONNECTICUT, TRANSMITTED WITH A COPY OF THE CONSTITUTION, SEPTEMBER 26, 1787.

"The general principles which governed the Convention in their deliberations on the subject are stated in their address to Congress. We think it may be of use to make some further observations on particular parts of the Constitution. . . . Some additional powers are vested in Congress, which was a principal object that the States had in view in appointing the Convention. These powers extend only to matters respecting the common interests of the Union, and are specially defined, so that the particular States retain their sovereignty in all other matters. . . . The restraint on the Legislatures of the several States respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners, as well as of the citizens of the different States, may be affected. . . . The Convention endeavored to provide for the energy



of government on the one hand, and suitable checks on the other hand, to secure the rights of the particular States, and the liberties and properties of the citizens. We wish it may meet the approbation of the several States, and be a means of securing their rights and lengthening out their tranquillity."

#### FIRST AMENDMENTS OF THE CONSTITUTION.

Notwithstanding these and similar assurances, great apprehensions were felt lest the Federal Government should draw too much power from the States, and, to quiet them, amendments were submitted, together with the acts of ratification. In Massachusetts JOHN HANCOCK led the way in proposing amendments to accompany the ratifying act, and the act itself contained the following, after the declaration of ratification: "And as it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the Commonwealth, and more effectually guard against an undue administration of the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:

"*First.* That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised," etc., etc.

From the Convention of New York a circular letter, signed by GEORGE CLINTON as President, was sent to the Governors of the several States, containing, among other expressions, the following: "We, the members of the Convention of this State, have deliberately and maturely considered the Constitution proposed for the United States. Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by a general Convention, and an invincible reluctance to separating from our sister States, could have prevailed upon a sufficient number to ratify it without stipulating for previous amendments. . . . We observe that amendments have been proposed and are anxiously desired by several of the States as well as by this. . . . Our amendments will manifest that none of them originated in local views, as they are such as, if acceded to, must equally affect every State in the Union."

The amendments thus recommended were in most respects like those actually adopted.

#### EXTRACTS FROM THE DEBATES IN CONGRESS ON PROPOSING THE FIFTEENTH AMENDMENT.

In the House, Mr. SHELLABARGER said:

"Nothing can be plainer to me than that every one of the States is left to the responsibility which it now has, and which my proposed amendment does not take away. It does not take away the right of the States to control the election. The Constitution itself provides that powers 'not expressly granted are reserved to the States and the people.' . . . And again: Hence, it follows that the power of regulating elections, not being prohibited to the States by the Constitution as it stands, resides now either with the States or the people. If this is so—if the power to regulate elections or registrations resides with the States, under the Constitution in its present form, then my proposition will not take it away. . . . The power of regulating elections and passing registration laws being with the States now, is not taken away by my proposed amendment." This proposed amendment of Mr.

SHELLABARGER would have modified the original resolution in some important respects, but not material to the present discussion. ("Congressional Globe," third session, Fortieth Congress, p. 727.)

In the Senate, Mr. TRUMBULL said:

"According to my view, and the view, I think, of the Senate, the United States Government has no right to regulate suffrage at present.

"Mr. STEWART: It has in the Territories and in the District of Columbia.

"Mr. TRUMBULL: That is true; but I was referring to the States.

"Mr. HOWARD: But the clause as it stands applies to all the States.

"Mr. TRUMBULL: If it is intended by this amendment to give the United States the regulation of suffrage, that is one thing, but that was not my understanding.

"Mr. EDMUNDS: It is intended to deny it.

"Mr. TRUMBULL: My understanding of the amendment was that its object was to prohibit the States from denying the right of suffrage . . . to any person on account of race or color. . . .

"Mr. EDMUNDS: . . . The object of this amendment is not to confer jurisdiction, but to deny to the United States and the States the right to exercise that jurisdiction in the way of limitation and exclusion. Therefore, while under the Constitution as it now stands, on the view of my friend, we have the power to exclude colored persons from voting in the District of Columbia, and in the Territories, it is one of the objects of this provision to deny to us or any political majority in Congress the power to make that exclusion. If this amendment was conferring power, instead of denying it, what my friend says would be true; but inasmuch as it is exactly the reverse, as it is a limitation on the power of Congress and on the power of the States, to make unjust exclusions on the ground of race and color, these words ought to stay in. . . . What we think it proper to prohibit we do prohibit. What we think it proper to leave where the Constitution and the frame of the government leaves without prohibition, we leave there. Now, if Senators are right in supposing that the right to regulate suffrage, and to hold office, is now with the States, then when we prohibit that regulation being made effective, upon certain points named in this amendment, we leave all the rest just where it stood before. If the right to regulate suffrage in any respects belongs to Congress, as in the Territories it does, and in the District of Columbia, then when we prohibit Congress from exercising that right on particular ground we leave its other powers unimpaired, exactly as they stood before. We do not give it any other powers, but we simply leave these other powers, if they exist, just where they were." ("Congressional Globe," third session, Fortieth Congress, pp. 1304, 1305.)



## PART II.

### *PAPERS AND ADDRESSES ON THE REFORM OF STATE AND INTERNATIONAL LAW.*



# LAW REFORM.

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## STATE AND INTERNATIONAL.

A VERY large portion of Mr. Field's public efforts have been directed to the reform of our jurisprudence. These efforts began more than forty years ago, and have been continued almost without interruption ever since. The task was of such magnitude and importance that it is hardly yet completed. The reforms proposed were the procurement of unity and simplicity in the administration of justice, by the abolition of the old, fictitious distinctions between law and equity; and the codification of the whole law, civil and criminal, substantive and administrative. The result has been the production of five codes—the Civil Code, the Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, and also a Political Code. Many of their provisions have been adopted in every English-speaking country; and it may fairly be said that it is only a question of time when the system projected by him will become the law of every country which is governed by the principles of English jurisprudence.

In the domain of international law he has been scarcely less active, having prepared a complete code of international law, and having been a projector and supporter of the International Code Committee of America, the Association for the Reform and Codification of the Law of Nations, founded in Europe, and the Institute of International Law.

The following papers, reports, and addresses are selected and arranged with a view to the presentation of the origin and gradual development of the law reforms in which he has been engaged.

## REFORM OF THE JUDICIAL SYSTEM OF NEW YORK.

FIRST part of a letter addressed to GULIAN C. VERPLANCK, Senator, December 26, 1839.

SIR: The reform of our judicial system will be the most important question of the next session of the Legislature. There may be other questions, more popular in their nature, which will engross for the time more of the public attention; but there will be none whose real and permanent consequence is comparable to this, in its relation to the order, the peace, and the

sound moral sentiment of society. It is of the nature of legal reform to be understood by a small class only, not merely because legal subjects are alien to the pursuits and the studies of the great body of the people, but because also the mal-organization and abuses of the judicial system fall directly upon the suitors only, themselves a small number compared with the whole population, and those, too, in general the least able to grapple with and excite general attention to the evils they suffer. The law acts upon individuals, not upon classes; the oppression, if oppression there be, is a private grief, which another does not readily make his own; the operation of the system is noiseless; the working of its machinery is scarcely heard amid the din of society; and the eye, except of the attentive and practiced observer, fails to perceive how it works, how complicated it is, what delicate adjustment it requires, what nice adaptation of parts, at once the most complex and the most potent of all the engines by which society is regulated and moved. It is difficult to draw general attention to the subject; how difficult, no one knows whose profession or whose particular studies have not brought him into acquaintance with it; and the reformer, too sensible of the evils and the wrongs of the present system ever to acquiesce in it, may find, nevertheless, that he has raised an ineffectual voice, drowned in the more noisy debates on other subjects, going on around him. It is not to be disguised, moreover, that there are intrinsic difficulties in the way of combining a learned, dignified, and impartial, with a cheap and speedy administration of the law—difficulties not too great to be overcome, but sufficient to deter the indolent and the timid.

The judicial system which prevails in this State has come now to be so inefficient for good, and so productive for evil, that some remedy is indispensable. It is in the hope—perhaps a vain one—of contributing something toward a real and permanent remedy, that I write this letter. Your position as a member of the Senate, the prominent part you have already taken in the discussions of the subject, and especially your speech at the last session, developing the most mature and best explained plan of reform which the discussion has given occasion to, lead me to think it not improper to address myself directly to you.

It is now several years since a reform of our system came to be considered a matter of the most urgent necessity. Since the peace of 1815, so great has been the progress of our industry and the increase of our wealth, so much have the sources of litigation been multiplied, that the business of the Courts long ago increased beyond their power to transact it. The catalogues of causes undecided have gone on swelling greater and greater every year. For the last fifteen years scarcely a session of the Legislature has passed, without some propositions to relieve the multitude of suitors who crowded the avenues to the Courts, with causes which the Judges could not hear—propositions generally rejected, sometimes adopted, and always found in the end inadequate. Even under the old Constitution there was much complaint of the delays and expense of litigation. The new Constitution went into effect the 1st of January, 1823. It was then supposed that, by the wise and provident policy of the Convention, which had remodeled the Courts and established a new system, it had secured a just and speedy administration of justice for future times. The malady into which the body-politic had sunk, under the old system, was thought to have been removed by the medicine of the Constitution, and a new state of healthful action brought on, that was never more to be subject to the disorders of the old. Notwithstanding these expectations, the new Constitution had scarcely gone into complete effect, and so early as the year 1825, when it began to be suspected that the new condition was as bad as the old ; that the remedies had only changed the seat of the disease, not removed it. In that year an inquiry was ordered by the Senate, by a resolution of the 14th of April, and the matter was referred to the Chancellor and the Judges. Their report was made in the year following. It was not to be expected that they should report any vice inherent in the system in which they were the chief officers. They recommended some changes in details and in the practice of the Courts, most of which have been since made. The subject has since been often debated and the inquiry repeated, by both the Senate and Assembly. But all these debates and inquiries have ended in nothing. Reports have been made, which, to say the least—and without intending any disparage-



ment to the eminent persons who have made them—have not equaled the reputation of the Commissioners. They seem to have been prepared in haste, upon insufficient information. As unlike as possible the reports of the English Commissioners on the same subject, who have collected a vast body of evidence, consulted the most experienced persons, and examined the question with great labor and great caution, our reports are but the types of our legislation, made apparently on the spur of the occasion, upon the impulse of the moment, with unnecessary haste, without first collecting and digesting the evidence, which the diligence, the experience, and the learning among our citizens could undoubtedly furnish, and likely to lead to nothing but what we have already too abundant—laws made by way of experiment, or enacted to-day to be repealed to-morrow, and then to give way to some new project or experiment no more lasting than its predecessors. It is curious to see how fruitless have hitherto been all the inquiries which the Legislature has ordered. References have been made to the Judges—their reports have suggested no adequate remedy, or have not been adopted—the commissions have been extended to the bar, that the experience of the bar might be added to the experience of the bench; and we find ourselves, nevertheless, in the seventeenth year of the new Constitution, not only not relieved, but in a condition to which our former history affords no parallel. The difficulty has gone on increasing, and at this moment we are in a state in which justice is virtually denied to great numbers of people. Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare. This young State, with scarcely two millions of people, and republican institutions of the most democratical character, administers justice to its citizens with less certainty and promptitude than even the old, overburdened kingdom of England, with fifteen millions of people, whose commerce and whose colonies encircle the world.

Such a condition of things is disreputable and oppressive. It is idle to boast of good and cheap government while it lasts. One of the greatest, if not the very greatest, of the duties of government is the administration of justice. The regulation of commerce, the making of public works, the fostering of in-

dustry, the development of internal resources, are as nothing compared with the determination of right between man and man. Indeed, sir, the evil can be endured no longer. If they who are the most competent for the work, or those who are most nearly connected with the present judicial establishment, and therefore most interested in preserving much of the present structure, do not undertake the work of reform, it will fall into less competent hands, or be done with an unsparing will, and without regard to the preservation of anything that we now have. The day of reform will come sooner or later, and, if it is put off by those who should lead it, it will hereafter push them aside or leave them behind.



### FIRST PRINCIPLES OF REFORM.

EXTRACTS from a letter to JOHN L. O'SULLIVAN, Member of Assembly, January 1, 1842, published as an "Appendix to the Report of the Committee on the Judiciary, in Relation to the more Simple and Speedy Administration of Justice."

MY DEAR SIR: I submit to you herewith the draft of three bills, one "for the more simple and speedy administration of justice in civil cases in the courts of common law"; another, "for the more simple and speedy administration of justice in the courts of equity"; and a third, "to simplify indictments," which, if you approve of them, I hope you will introduce into the Legislature. You see that they propose very great changes in our present system of practice in all the Courts. Great changes we both believe are needed; and I can not think that less will answer the purpose. These bills are as concise as I could make them. It is possible, even, that fault may be found with them for not going into more detail, or for sacrificing precision to conciseness. They are the fruits, certainly, of no little reflection, and I ought to add some observation, respecting the changes which they are designed to effect.

Before we venture upon a change in the existing laws, we ought, I admit, to be quite sure *that there is a present evil of sufficient magnitude to overbalance the necessary inconveniences of change*; and, if we find such an evil to exist, then we ought

to satisfy ourselves, *first, that it is owing to something peculiar to our system, and not inseparable from the administration of law; and, secondly, that we have found a permanent remedy.*

We know that every change is attended with some inconveniences, sufficient at least to deter us from it, unless a manifest benefit is to follow. We all feel that there is too much legislation, and too little disposition to rest contented with what we have. Permanence in the laws is desirable for its own sake; but permanence is a rule of policy which must yield to a higher rule.

Then there are evils inseparable from every administration of the laws, from every human institution. He will prove himself a visionary legislator who shall set to work with the notion that everything should be perfect. There will never be an administration of the law without delay and without expense.

The question is really one of degree. How good can we make that which can not be perfect? How much of the delay, how much of the expense, and how much of the uncertainty can we remove?

Now, as to the existence of an evil of such magnitude as to outweigh every possible inconvenience of change, there can not be much doubt. You and I know that it does exist. The suitors know it, and all those persons who, as jurors or witnesses, are conversant with the Courts, know it. For the information of those who are not conversant with the Courts, and who do not know the extent of the evil, I will go into some detail.

First—*as to the delay.* . . .

Second—*as to expenses.* . . .

. . . And yet there are persons who think that no change is wanted. There will always be some men, the foes of all innovation, to stand up in defense of everything as it is, to dispute every inch of ground with the advocates of change. And foremost among them are generally some whose profession has made them most familiar with the existing system.

It is hard to forget the lesson which we have repeated daily for half our lives, however difficult it was to learn it at first; and perhaps the harder the more difficult were the first lessons. We love to repeat the mental processes to which we are accustomed. The lawyer's studies, moreover, lean rather to laws as they are than to laws as they ought to be. It is his profession

to understand them, with all their inconsistencies, their verbal distinctions, their scholastic refinements—not to make them. By an easy process, he comes to regard the arbitrary rules, from which he daily reasons, as natural and true.

' It is natural, then, that there should be many of the legal profession, and those, too, among the closest of its students and the most successful of its practicers, who set themselves against all innovations. They may be men of the purest character and the profoundest learning. They obey the law of their minds. They can not act as the expounders of one system and be the advocates of another. They find it difficult to conform to a rule, and to see, nevertheless, that the rule is wrong.

3 | How many men are there, of the older members of that profession, who did not dislike the abolition of fictions in the action of ejectment? The men of straw, in whose names the controversy was carried on—the casual ejector and the like—had taken possession of their imaginations, and they parted from them as from real entities whose presence was essential to justice. A few years have changed all this; and they would now, doubtless, be very sorry to own their former partiality for these solemn fictions. ) 2

These champions of things as they are, however, by no means represent the majority of the profession; with the larger body of lawyers, the opinion is very prevalent—an opinion that gains ground every day—that the present system is unreasonably arbitrary, dilatory, and expensive. While I am on this subject, let me say that I think injustice has been done to the great body of the profession. They have seen constant efforts at reform, directed rather against their own emoluments than at the system. They were asked to coöperate in a plan, which they could not approve, of cutting off a part of their remuneration, without diminishing their labor. It was not often that a lawyer was overpaid for what he had to do. The true reform was to diminish the labor, and the compensation along with it. On the contrary, there seems often to have been a disposition to force them to do more work and to take less for it. If they have not joined in this scheme, let it not be attributed to ignorance of the defects of our present system, or to any wish to profit by or to perpetuate its abuses.

Assuming, now, that there does exist an evil of sufficient magnitude to justify change, I proceed to the consideration of the two questions, which I mentioned at first, viz. : whether it is a necessary evil, or is owing to something peculiar to our system; and, secondly, whether we have found a permanent remedy. I say, a permanent remedy, for perpetual agitation of the subject is worse than its present condition. Let us consider it well; make no change that does not promise to work well and to last; and, when we have made it, let us give it a fair trial.

I shall endeavor to answer both questions together. This will save me considerable repetition, for I shall often be obliged to answer the first question, whether there be a remedy, by answering the second, and showing what the remedy is.

There are two ways of answering both questions : one, by referring to the experience of other States; the other, by examining step by step the proceedings in a cause, according to our present practice, considering their necessity, and comparing the whole with a natural system. Each will lead us to the same conclusion. I shall begin with the latter, and I can not but think that the more one examines the system, the more he will wonder that it should have been borne with so long; a phenomenon referable only to the tenacity with which we cling to ancient customs, to the force of associations, and the force of habit.\*

## WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS?

Questions addressed to Lawyers. An Essay published January 1, 1847.

THE Constitution of this State, which goes into effect to-day, will render great changes necessary in our system of legal procedure. It remodels our Courts; unites the administration of law and equity in the same tribunal; directs testimony to be

\* Then followed a scheme of reform, with drafts of the proposed bills, containing germs of the reforms actually put into practice in the Code of 1848, the principal difference being that the bills proposed were framed with reference to the distinction then authorized by the Constitution of 1830 between courts of law and courts of equity, whereas that distinction had been broken down by the Constitution of 1846.

taken in like manner in both classes of cases; abolishes the offices of Master and Examiner in Chancery, hitherto important parts of our equity system; and, finally, directs that the next Legislature shall provide for the appointment of three commissioners, "whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record," and report thereon to the Legislature for its action. J D

Important modifications of the equity practice are thus made indispensable, in order to adapt it to the new mode of taking testimony. But I think that the Convention intended, and that the people expect, much greater changes than these. We know that radical reform in legal proceedings has long been demanded by no inconsiderable number of the people; that a more determined agitation of the subject has been postponed by its friends, till such time as there should be a reorganization of the judicial establishment, upon the idea that a new system of procedure and a new system of Courts ought to come in together; that it was a prominent topic in the Convention itself, where its friends were in an undoubted majority; and that the manifestations of public sentiment out of doors were no less clear than were the sentiments of that body. Indeed, if now, after all that has been done within the last five years, there should be made only such changes as the Constitution absolutely commands, there will be great and general disappointment.

The profession stands at this time in a position in which it has not before been placed. Shall it set itself in opposition to the demands of a radical reform? shall it be indifferent to it? or shall it unite heartily in its prosecution? None can reform so well as we, as none would be benefited so much. We can not remain motionless. We must either take part in the changes or set ourselves in opposition to them, and then, as I think, be overwhelmed by them. Even if it were originally a matter of indifference whether they should be made, or it were certain that any change was undesirable, it is no longer possible to resist the current which sets so strongly in that direction.

But it really never was a matter of indifference to the best part of the legal profession, whether there should be a reform in legal proceedings. A certain portion of them undoubtedly

were opposed to all changes; but there were others who were true reformers, and a majority of the body were for change of some sort. I will not say that they were agreed in respect to the extent of the changes required. Some were for a radical reform; others thought moderate amendments sufficient; it was a feeble minority which denied the need of any.

If it had depended upon the bar alone, I believe that many important amendments would have been made, which we are now without. Various causes have contributed to prevent their doing as much as they would otherwise have done, the principle of which is, the jealousy with which concert of action on their part was regarded by others. It is a mistake to suppose that our present legal machinery has been regarded by them with much favor. On the contrary, I think they have disliked it generally. They would choose something better to drive over our modern ways, than this cumbrous thing—three hundred years old and more—ill-adapted to our present circumstances, unequal to our present wants, and so altered and mended that scarce any two parts seem of a piece. Possibly I mistake the opinions and the inclinations of the majority of my profession. The part they take in their present circumstances will show what their opinions and inclinations really are.

Every consideration, as it seems to me, makes it expedient for us all now to enter heartily upon the work of amendment. Those of us who have long been laboring for a radical reformation of the law, and those who have felt less inclination for it, should find this an occasion to act together in the common pursuit of thorough and wise reforms. We feel the inconvenience of the present state of things. We know that the technicality and the drudgery of legal proceedings are discreditable to our profession. Justice is entangled in the net of forms.)

There are undoubtedly some inconveniences attending every change. To accommodate one's self to a new mode of transacting business, after he has long been habituated to an old one, requires an effort. The chains of habit are always strong, and perhaps the nature of legal studies, which inculcate adherence to precedents, makes them lie stronger on lawyers than on any other class of persons.

Great, however, as are these inconveniences, we are obliged

now to undergo them to a large extent; and, being so, there is the more reason for making them so thorough that they will be, as far as possible, final. To do the work now so that it shall be but half done, is but to expose ourselves to another fit of change, with all its disadvantages.

For all reasons, therefore, it appears to me the wiser and safer plan, when we are about it, to make a radical reform; in short, to go back to first principles, break up the present system, and reconstruct a simple and natural scheme of legal procedure. ~~The adoption of such a scheme would be one of the most beneficent reforms of this age.~~

Believing, therefore, that great changes are inevitable in any event, and that this is a period favorable to the adoption of all the reforms which are really required, I wish it were possible to engage every member of the legal profession in the promotion of a wise, safe, and radical reform. Radical reform will come sooner or later, with us or without us. Shall we coöperate to make it at the same time wise and safe?

*Such a reform, I am persuaded, should have in view nothing less than a uniform course of proceeding, in all cases, legal and equitable.*

A legal proceeding has three principal stages: the allegations of the parties, the proofs, and the decision upon the law and the facts. The question whether there shall be a uniform course of proceeding, then, amounts to this: Shall there be a uniform mode of stating the allegations of the parties, taking the proofs, and deciding the questions?

What is meant by a uniform course of proceeding? Not that precisely the same shall take place, for all demands, and all kinds of relief. That is not possible, so long as the cases themselves differ from each other. One may need one kind of relief, another a different kind. In some cases, complicated accounts may require a reference to persons particularly qualified to state them; in others, a party may wish an injunction, or a receiver; one person may claim a specific performance of a contract; another may seek compensation in damages; some disputed questions of fact may be best tried by a jury, others by the Court. In short, the particular kind of relief must depend upon the circumstances of the particular case.



It is not, therefore, the exact correspondence of all the proceedings in all cases that we mean when we speak of a uniform course of procedure; nor, indeed, is such correspondence either desirable or possible; but, we mean a general conformity in the different cases, so that, while the particular circumstances of each may receive such remedy as they require, the outline of the proceedings in all may be the same, and a knowledge of the course pursued in one may serve as a guide in the others.

As I have already mentioned, the new Constitution has provided that the testimony in equity cases shall be taken in like manner as in cases at law. Uniformity, therefore, in the mode of taking proofs is already established. It remains, then, to consider whether there shall be a uniform mode of stating the allegations and deciding the questions, or, in legal phraseology, of pleading and of trial. For the present, I shall confine myself to the former of these questions, and the consideration of that stage of a lawsuit which consists of the allegations of the parties. In respect to this, I shall attempt to show:

I. That a uniform course of pleading in all cases is practicable.

II. That it is desirable.

III. That now is the time to effect it.

Upon the point of practicability my positions are these:

1. That the practice of obtaining discovery by answer, in equity, may be discontinued, leaving the bill of complaint and answer to be regarded merely as pleadings.

2. That the same form of pleadings will answer for all cases of legal cognizance; or, in other words, that the present forms of action may be abolished, and the pleadings in all cases consist of complaint and answer.

If the practice of obtaining discovery by answer, in equity, were discontinued, the pleadings would naturally fall into a plain, short statement by each party, of his own case. May we, then, dispense with that practice? May not a discovery be obtained in some other way?

The Revised Statutes made an important change in equity pleadings. They provided that when a bill should be filed, other than for mere discovery, the complainant might waive

the necessity of the answer being made on the oath of the defendant, and that in such cases the answer might be made without oath, and should have no other or greater force, as evidence, than the bill. This left the bill and answer in those cases to be regarded simply as pleadings, and thus naturally shortened and facilitated the proceedings. But if the complainant wishes to examine the defendant, he is still obliged to have recourse to the old method. I would go a step further, and abolish the discovery in all cases, while I would waive the oath in none. The former will do for the whole what the Revised Statutes have done for a part, and the latter will still more shorten the pleadings by excluding from them everything that the party is not willing to verify by his oath.

It is often necessary for one party to examine the other respecting facts in his knowledge, which can not otherwise be proved. For this purpose he is now obliged to have recourse to the clumsy expedient of a bill in equity, for a discovery in aid or in defense of a suit at law. None need be told what delay this occasions, nor what expense the suitor is put to in consequence. The bill itself is made much longer than it would be if it were intended merely as a statement of the plaintiff's case. The answer is certainly many times longer and more particular. I make no doubt that, if the bill and answer were regarded merely as pleadings, and there was no temptation to extend them unreasonably, they would be compressed within a small part of the space they now fill. One of the Chancellor's rules now requires an abbreviation of the pleadings for his use, not exceeding one sixth of the original. This is as long as the original itself ought to be. The saving of time would be still greater. The forty days now allowed for the answer might be reduced to ten; and, after the answer is once in, there would be no delay, from exceptions to it, for insufficiency. These exceptions do now occasion a great deal of delay. The plaintiff has twenty days to except, and eighteen afterward to refer the exceptions to a Master for examination; the Master may delay his report almost indefinitely, if he choose to certify that delay is necessary; when his report is last made, eight days are allowed to except to it; if excepted to, the exceptions have then to be argued before the Vice-Chan-

cellor or Chancellor; his deliberations may take any time, from one month to three years; and from his decision there may be an appeal; so that the simple question whether the defendant has made a full answer to the questions put to him, may have to be decided by successive Judges, till it is finally put at rest by the highest Court in the State. And this process may have to be gone over more than once in the same cause, when a second answer is objected to, for insufficiency. Not one of these delays could happen, if the bill and answer were treated simply as pleadings, without regard to discovery.

Why should they not be so treated? Why should it be necessary to go through with this troublesome, dilatory, and expensive process, simply to ask one's adversary a question? Might not the parties be asked the same questions before the Court on the trial of the cause? I see no danger, but great advantage, from doing so. But if an oral examination is objected to, then examine upon written interrogatories. It is the practice now, in our courts of admiralty, and in the Courts of Louisiana, and was recommended by the Law Commissioners in England, to allow a party to exhibit interrogatories for his adversary to answer. No objection can surely be made to that mode which does not apply equally, and with more force, to an examination by bill and answer. The principle is the same; the process is simpler, quicker, and cheaper.

But it strikes me that an oral examination is better than written answers, for two reasons: one, that it is less expensive; and the other, that the discovery will be more complete. If it be worth while to have the discovery at all, it is worth having it well done. An examination upon interrogatories never can be perfect. He must be a dull person indeed, and poorly provided with counsel, who, when he has written questions to answer, in his own closet, with ample time for it, can not contrive to conceal as much as he discloses.

Indeed, I am unable to perceive a single reason why one party should not have the right to call the other into court, and to question him in its presence. This is now allowed in cases of usury. Is there danger that the rights of the party will not be protected? Certainly, if with the Court before him and his counsel by his side, his rights are not safe, then, for the

same reason, no witness ought ever to be interrogated orally, for fear his rights may be infringed. Some persons are very tender of the consciences of parties, thinking that the temptation to perjury will prove too strong for human frailty, and that, therefore, if I understand the drift of their argument, no person ought to be questioned about any matter where he has an interest. This is not only striking at the foundations of all testimony, but it involves this palpable absurdity, that, because in some cases the motive of interest is stronger than the principle of honesty, therefore those truths which are only known to interested parties shall for ever be hidden.

Supposing, then, that the bill and answer be no longer regarded as the instrument of examining the parties, what are the pleadings but simple statements, by way of complaint and answer, of each party's case? I say nothing of the replication to the answer, for that is but a notice that the plaintiff does not admit the truth of the answer. This form of pleading is natural. The plaintiff states his cause of action. The defendant gives his answer to it. They each give it as they intend and expect to prove it. Of course, all the undisputed facts are admitted on both sides, if each party is required, as he should be, to verify his pleading by his oath.

Then, will the same form of pleading answer for cases of legal cognizance? In other words, is it practicable to abolish all the forms of action now in use in common law cases, and to substitute in their place a complaint and answer, according to the fact, as in the other class of cases? By practicable, I mean not possible only, but capable of being done, without failing of any of the purposes subserved by the present forms of pleading. Are these forms necessary? Are they useful? To answer this question, let us first understand what those purposes are; and to that end it may be necessary to look a little into the history of our present actions and pleadings.

In the earliest periods of our law, every cause was commenced by an original writ, issuing out of the Court of Chancery, describing briefly the cause of action, and returnable before some of the courts of law. It was this writ which gave jurisdiction of the cause to those Courts, the writ combining the two qualities of a summons to the defendant and a commission to the

Judges to hear and determine the controversy. These writs can be traced back as far as Henry II, and were probably derived from the customs of Normandy. They were conceived in certain fixed forms, and, unless an original writ could be found or devised for the case, the suitor was without remedy in the courts of law.

The writs, being thus confined within certain established forms, were soon classified, and all actions at common law were accordingly divided into a certain number of classes, fifty-nine in all, according to some enumerations; the more common of which were the writ of right, dower, ejectment, debt, covenant, detinue, trespass, trespass on the case, and replevin.

These actions were all known in the time of Edward I, and, though some of them have been modified and made more comprehensive, no new action has been devised within the last three hundred years, although property has taken many new shapes, and the business of mankind has undergone a complete revolution. Whatever new cases have arisen, not within the scope of these actions, have either gone without remedy, or the parties have been driven into the Court of Chancery, where, the forms not being fixed, relief could be given adapted to the case.

On the return of the original writ into the Court of Common Law, the pleadings there commenced. The plaintiff repeated the original writ, the defendant answered it. The answers also soon fell into set forms. At first the allegations were made orally, and taken down by the clerk. About the middle of the fourteenth century oral pleadings were discontinued, but the same forms were used as before, and to this day the record is framed as though the parties or their attorneys actually made their allegations in open court. The record was kept in Norman-French until the year 1353; from that period until 1730 it was in Latin; and then by statute it was ordered to be kept in English.

Originally the pleadings were short and simple, as may be seen on looking into Glanville or the Year-Books. Stated forms were not known to the Anglo-Saxons. They came in with the Norman conquerors, and had, it is supposed, a Frank origin. In process of time they became extremely technical. It was

just one of the subjects to exercise the ingenuity of the schoolmen. When the pleadings came to be written in English, they were in a great degree mere translations of the Norman and Latin forms. The phraseology, therefore, was really not so much English as Norman and Latin.

The narrow spirit in which the Courts construed the language, and required the proof to correspond with the allegation, in the strictest literal sense, led to repetitions, pleonasm, and to the introduction of different counts as different ways of stating the same case. For these reasons the pleadings came in process of time to be long, overloaded with verbiage, uncouth phrases, and endless repetitions. Many rules have been established by the Courts and pleaders together, prescribing the manner of pleading and the forms of the allegations. These rules, and the commentaries upon them, form, as every lawyer knows, one of the most technical and abstruse branches of the law. They are ingenious, everybody will admit; the principal ones are founded on sound logic; others are founded on distinctions purely verbal; and many of them tend to shut out the truth, and embarrass the party in a labyrinth of forms. In many cases they have been found so strict, that the Legislature has interposed. That rule, for instance, which, for the sake of singleness of issue, allows but one answer to one pleading, was modified by the statute of Anne, so as to allow as many different pleas as one wished; and by our Revised Statutes still further, so as to allow different replications to the same plea.

It was early found that a form of plea could be devised which in many actions would virtually deny every material allegation of the declaration, without disclosing any particular defense. The Courts have been constantly admitting new defenses under these general issues. The Legislature has also provided by law that the defendant may plead the general issue, and give notice with it of any defense which he could not regularly introduce under such issue. It has even gone further, and provided that any public officers, when prosecuted for acts done by virtue of their offices, may plead the general issue, and give any defense in evidence without notice. There could scarcely be a more glaring inconsistency; for, either special pleading is a help to justice, and should therefore be adhered to in all

cases, or it is a hindrance and a burden, from which all parties should be free.

Besides the general pleas, which we call general issues, we have general declarations, or common counts, as they are called. These have been so contrived as to give no information of the particular demand. This form has been encouraged by the Courts, so as to allow a vast number of demands to be given in evidence under it. It has consequently become a common form of declaration; and even where special counts are used, the common counts are generally added. It appears, therefore, that there has been a constant struggle of the lawyers and the Courts to evade the rules which themselves have framed. They made the rules and they defend them, as a means of eliciting the precise point of fact in dispute between the parties; and they contrive every means in their power to conceal it, under forms the most general and unmeaning that can be imagined.

The declarations, then, are either so general as to convey no idea of the plaintiff's demand, or they are special, and intended to describe it precisely; but a variance between the allegation and the proof is so often fatal to the recovery, that the plaintiff resorts to the expedient of stating the same cause of action in different counts, so as to embrace every possible aspect of the proof; and all the forms, both general and special, are redundant with words multiplied on words.

After the declaration the defendant may demur, or he may put in a dilatory plea, or a plea in bar. These defenses must be taken separately; the defendant can not demur and plead to the same count in the declaration, nor can he put in at the same time a dilatory plea and a plea in bar.

The defendant may indeed plead as many pleas in bar as he likes, but each plea must either deny some allegation of the declaration, or aver new facts, which, without denying the declaration, do away with their effect; that is, he must plead by way of traverse, or by way of confession and avoidance. And the plaintiff, if he replies to the pleas, must conform to the same rules; and so on with each party, through all the successive stages of allegation and counter-allegation, till some proposition, *either real or verbal*, is evolved, which one party avers and the other traverses, or to which one demurs and the other

joins in demurrer. If the issue be one of law, arising upon demurrer, we know that the party against whom it is decided is in nine cases out of ten allowed to amend his pleading on payment of the costs of the demurrer. The consequence is that, after the cause is decided upon the demurrer, the parties have to go over the same ground again, before the cause can be finally disposed of.

The system, then, in actual use in this State is this: We have ten different forms of action, each with its peculiar technical language. A mistake in the form of the action is generally fatal to the case. And the principal rules for the regulation of pleading, and the production of an issue, are the following:

"After the declaration the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.

"Upon a traverse, issue must be tendered.

"Issue where well tendered must be accepted.

"All pleadings must contain matter pertinent and material.

"Traverse must not be taken on an immaterial point.

"A traverse must not be too large, or too narrow.

"Pleadings must not be double.

"A pleading will be double, that contains several answers, whatever be the class or quality of the answer.

"Matter may suffice to make a pleading double, though it be ill pleaded.

"But matter material will not operate to make a pleading double.

"Nor matter that is pleaded only as necessary inducement to another allegation.

"Nor matters, however multifarious, that together constitute but one connected proposition or entire point.

"It is not allowable both to plead and to demur to the same matter.

"The pleadings must have certainty of place.

"The pleadings must have certainty of time.

"The pleadings must specify quality, quantity, and value.

"The pleadings must specify the names of persons.

"The pleadings must show title.

"The pleadings must show authority.

"In general, whatever is alleged in pleading must be alleged with certainty.

"It is not necessary, in pleading, to state that which is merely matter of evidence.

"It is not necessary to state matter of which the Court takes notice *ex officio*.



"It is not necessary to state matter which would come more properly from the other side.

"It is not necessary to allege circumstances necessarily implied.

"It is not necessary to allege what the law will presume.

"A general mode of pleading is allowed where great prolixity is thereby avoided.

"A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty.

"No greater particularity is required than the nature of the thing pleaded will conveniently admit.

"Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

"Less particularity is necessary in the statement of matter of inducement or aggravation than in the main allegations.

"With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.

"Pleadings must not be insensible, or repugnant.

"Pleadings must not be ambiguous, or double in meaning; and when two different meanings present themselves, that construction shall be adopted which is the most favorable to the party pleading.

"Pleadings must not be argumentative.

"Pleadings must not be in the alternative.

"Pleadings must not be by way of recital, but must be positive in their form.

"Things are to be pleaded according to their legal effect.

"Pleadings should observe the known forms of expression, as contained in approved precedent.

"Pleadings should have their proper formal commencement and conclusion.

"A pleading which is bad in part is bad altogether.

"There must be no departure in pleading.

"When a plea amounts to the general issue, it should be so pleaded.

"Surplusage is to be avoided.

"The declaration should have its proper commencement, and should, in conclusion, lay damages, and allege production of suit.

"Pleas must be pleaded in due order.

"Pleas in abatement must give the plaintiff a better writ or declaration.

"Dilatory pleas must be pleaded at a preliminary stage of the suit.

"All affirmative pleadings which do not conclude to the contrary, must conclude with a verification.

"In all pleadings where a deed is alleged under which the party claims or justifies, proof of such deed must be made.

"All pleadings must be properly entitled of the court and term.

"All pleadings ought to be true."

Of what real utility is this system? Can any one tell what good comes of keeping up the division of actions into covenant, debt, trespass, case, replevin, and the like? Is there in the nature of things a reason for taking one form of action when a note happens to be sealed, and a different form when the seal is wanting? The division of actions arises only from the use of strict technical forms in declarations. While those forms exist, and the cause of action is stated, not as it really is, and as it will be told to the Court and jury on the trial, but according to old *formulas*, which have come down to us from remote ages, it may be convenient to classify them, and to give each class its name; but there can not be any good reason why the story should not be told in the ordinary language of life, in the only language intelligible to the juries who are to decide the causes; and if that were done, the distinction of actions would cease, of course.

Let no one be deterred from demanding this change because possibly he may be decried for it. That will do him no great harm. Doubtless the change from Norman-French into Latin was thought a most dangerous innovation in its day, and that from Latin to English ridiculed as unnecessary, unworthy of the law, and quite beneath the learned special pleaders of 1730. But the English Parliament judged, and judged rightly, that the papers which related to the allegations of common men, and contained the issues that plain jurors were to try, might as well be couched in the language which those parties and juries understood. Our descendants may, perhaps, think that we did no wrong in translating the present obsolete phraseology of pleadings into the common tongue.

An additional motive for abolishing the forms of action is, that we should then be able to make the parties verify their allegations by their oaths. Such verification strikes me as desirable, both as a means of preventing to a considerable extent groundless suits and groundless defenses, and of compelling the parties respectively to admit the undisputed facts. But the oath can not be required without first abolishing the present forms of pleading. No man could swear to the truth of a declaration in *trover*. Nor could he, in one case in ten, swear to the truth of the general issue in *assumpsit*. I once knew a

defendant, who had been sued upon a judgment of more than twenty years' standing, sorely puzzled how to plead. The statute makes the lapse of time presumptive evidence of payment, to be rebutted only by an acknowledgment, or a payment of part within the twenty years. The only plea which could be put in was that of payment. Being a special plea, he was required to verify it under the new rules. But he could not swear to the payment, for he had not paid. Here was the absurdity of making the party plead something which it was impossible for him to swear to, the plea being an untruth—which untruth, however, was to be deemed proved, on proof of the lapse of time.

What I propose, then, in respect to cases of legal cognizance, is this: that the present forms of action be abolished, and in their stead a complaint and answer required, each setting forth the real claim and defense of the parties. Such pleadings would be precisely similar to those proposed for equity cases, *and we should thus have a uniform course of pleading for all cases, legal and equitable.* The distinction between the two classes of cases is now merely a distinction in the forms of proceeding. The Court of Chancery has existed only in consequence of the narrow and fixed forms of the common law. If those forms had been abolished, and a natural procedure adopted, the course of the two Courts would long ago have been assimilated.

Let the plaintiff set forth his cause of action in his complaint briefly, in ordinary language, and without repetition; and let the defendant make his answer in the same way. Let each party verify his allegation by making oath that he believes it to be true. The complaint will then acquaint the defendant with the real charge, while the answer will inform the plaintiff of the real defense. The disputed facts will be sifted from the undisputed, and the parties will go to trial knowing what they have to answer. The plaintiff will state his case as he believes it, and as he expects to prove it. The defendant, on his part, will set forth what he believes and expects to establish, and he need set forth no more. He will not be likely to aver what he does not believe. His answer will disclose the whole of his defense, because he will not be al-

lowed to prove anything which the answer does not contain. He will not be perplexed with questions of double pleading, nor shackled by ancient technical rules.

When the answer is put in, the cause may either be considered at issue, without a replication, or a special replication may be allowed to avoid new facts set up by the answer. The common replication is a mere form. Replications are not used in Louisiana, where the pleadings consist of petition and answer.

Special replications have been long disused in the Court of Chancery, and I see no reason why they should be considered necessary in common-law cases. But suppose the answer to set up new facts, which the plaintiff can not deny, but which he can answer by new matter, explaining away the effect of the new facts of the answer, how, it may be asked, is the plaintiff to bring the new matter out? I answer, he may bring it out in his proof in answer to the proof on the defendant's part, just as a plaintiff would bring it out now, if the defendant should plead *non est factum* in covenant, and give notice of special matter. How will the question appear upon the pleadings? So far as the record is concerned, it will appear thus: The allegations of the complaint are admitted; a new fact is alleged on the part of the defendant; this new fact the plaintiff is considered as opposing, either by a positive denial or as capable of being explained away by other facts, and therefore not having the effect claimed for it.

Either this may be done, or the course now pursued in equity cases may be followed, of amending the complaint when new facts are brought forward by the answer, so as to present the facts which shall avoid the facts of the answer. Or still another mode may be adopted—that of requiring the parties respectively to give notice to each other of their points before the trial. Something of the sort now prevails in the Court of Admiralty of this district, and in the common-law Courts of Massachusetts.

The most ample power of amendment should likewise be given to the Courts. They should be enabled to amend the pleadings, in furtherance of justice, either when they are not sufficiently precise, or when they vary from the proofs; taking

care to guard the parties against injury from surprise. The power is one not likely to be abused, and is indispensable, to save parties from the consequences of inadvertence or mistake.

Will it be said that the mode of pleading by complaint and answer, in the way I propose, will not put the case in a position to be tried by a jury? Let us see.

In the first place, is not the experience of Louisiana and Scotland decisive? To say nothing now of Scotland, whose system I leave for future examination, I think the example of Louisiana should be sufficient for us. There, as I have already observed, the only pleadings are petition and answer. These are laid before the jury, who endorse their verdict upon the petition. All civil causes are tried by jury when either party desires it. Has any complaint been heard that the issues are not well defined, or that the juries can not perform their appropriate functions?

But if there were no experience in its favor, might we not reasonably expect that it would succeed? Any system would be better than the present. What with the common counts, and the general issues, we have now in most cases really no pleadings, no statement of the claim or defense, till the cause is called on for trial. For I regard the declaration upon the common counts, and the general issues, as good for nothing in any useful sense. They secure not one of the purposes for which the present system of pleadings is so much praised; not one of the purposes for which written statements of the facts are desirable.

You might just as well require the parties to copy and file each a verse of the "Iliad," and call that coming to an issue. It will not mend the matter to say that, in the case of common counts, a bill of particulars can be required. That only proves that the bill of particulars, which is a plain statement in ordinary language, is worth something; not that the count is of the least use. The extent to which these counts and issues are used may be inferred from the fact that out of eighty-nine cases taken at random, the declarations in eighteen contained the common counts only, and forty-two others the common counts, with a copy of a note or bill of exchange annexed; in forty cases the judgments were taken by default; in twenty by

confession ; and of the twenty-nine in which verdicts were rendered, five were on the general issue without notice, and seven upon the general issue with notice. This was after the act requiring the defendant to annex an affidavit of merits to his plea in a suit upon written contract for the payment of money. Before that law, no doubt, most of the forty cases in which defaults were entered would have had the general issue pleaded for delay.

Let it be borne in mind, also, that the tendency of our judicial decisions and of our legislation has been to encourage and extend the use of these very counts and issues. A stronger argument could scarcely be used, to show the unfitness of the rules of pleading for general practice, than the constant struggle to get rid of them, even at the price of having no pleadings at all.

The legitimate end of every administration of law is to do justice, with the least possible delay and expense. Every system of pleading is useful only as it tends to this end. This it can do but in one of two ways: *either by enabling the parties the better to prepare for trial, or by assisting the jury and the Court in judging the cause.* Let us consider it, then, in these two aspects:

*First, as it enables the parties to prepare for trial.* This it can only do by informing them of each other's case. To make them settle beforehand wherein they disagree, so as to enable them to dispense with unnecessary proofs, and to be prepared with those which are necessary, is the legitimate end of pleadings, so far as the parties are concerned. Now, no system could accomplish this more effectually than the one proposed. The plaintiff's whole case is stated in his complaint, the defendant's whole case in his answer ; and nothing beyond what is contained in one of these is to be received in evidence, except, perhaps, such rebutting proof as may have been specified in written points, filed a certain number of days before the trial.

Is not this a certain way of apprising the parties of what they have to try ? And is it not a simpler and easier way of doing it, than by the long labyrinth of replications, rejoinders, and the like ? All this excessive subtilty and refine-

ment on the one hand, and this monstrous jargon and prolixity on the other, can not be necessary to inform the parties of the points in dispute between them. Why, any plain man, hearing the parties' own statements, would get a better understanding, in half an hour, of the points in dispute between them, than the most astute lawyer can get from our modern records.

*Second, as it assists the jury and the Court in performing their functions.* An opinion prevails that nothing but common-law issues are fit for a jury. Many lawyers are wedded to the system of pleading according to the ancient rules, though they admit and deplore the imperfections of our present practice. It is said that the production of the issue disentangles the case, lessens the number of questions of fact, and separates them from the questions of law.

Now, I deny, in the first place, that the production of an issue, according to the course of the common law, does really lessen the number of questions of fact. The declaration may contain any number of counts, each setting forth different causes of action, or the same cause of action in different forms. If the same plea is put into all the counts, there will be as many issues as there are counts. But the defendant may plead as many pleas to each count as he likes; and the plaintiff, with leave of the Court, may put in as many replications to each plea as he may happen to have answers to it. Suppose, now, a declaration containing five counts—no uncommon thing—three pleas to each count, and a single replication to each plea. Here are fifteen issues; and, if there be two replications to each plea, there will be thirty.

In a case in the 23d of Wendell,\* there were thirty replications to the plea. Now, this of itself certainly does not prove that the mode of pleading might not have lessened the number of issues, but it proves that under the common-law system thirty questions or more may be presented to the jury in one case; indeed, that an indefinite number of issues may be presented to the jury, whom the law supposes capable of disposing of them all. But who ever heard of thirty substantial questions actually arising in a single cause? In fact, it has been the effect of this system to raise up a great number of issues

upon mere verbal distinctions. So far, then, its tendency has been to increase, rather than diminish, the number of questions.

But, apart from this, is it possible for any system of pleading to lessen the number of real questions without doing injustice? The jury must pass upon all the disputed questions of fact in a cause, or it must be imperfectly understood. No pleading can lessen the number of questions really disputed; it may lessen the number apparently disputed, but the apparent dispute disappears the moment the trial is opened. The pleadings may make the parties show beforehand what facts are disputed; but if they exclude any facts which might affect the decision of the cause, they are instruments of injustice.

As to disentangling the questions, and separating those of fact and of law, it may be answered that it does it very imperfectly. It is impossible it should be otherwise. The system must be very much changed before that is the effect of it. The most stringent applications of the rules, when they have developed the issues, will be found, on analyzing them, to have brought out only complex questions, comprehending subordinate ones of fact and of law. Take, for example, the issue of *tender, payment, fraud, release, marriage, devise, property in trover, or replevin or title in trespass or ejectment*. These are all complex questions, and to decide some of them may require the decision of many subordinate ones.

The attempt to reduce questions to all their elements before trial, must commonly fail. What subordinate ones may arise can scarcely be known till the evidence is all disclosed. The greatest diligence and skill will lead only to an approximation, greater or less according to the nature of the original questions. The first one is always this: Has the plaintiff the right, or the defendant? This depends upon others. You may go on, if you please, to reduce them as far as possible, but you will scarcely ever reach the elementary ones till the cause is brought to trial, and the evidence produced. Then, by a strict analysis, they are rapidly sifted; and the cause turns at last upon two or three.

So apparent is it that our issues generally do not present simple questions, but complex ones, both of law and fact, that the law allows the jury, in all cases upon every issue, to find a



special verdict, setting forth in detail all the facts tending to prove or disprove the affirmative of the issue, and referring the conclusion, from these facts, to the Court.

But suppose that the pleading did develop the questions, and quite separate those of fact from those of law, of how much advantage would it be to the jury, or the Court, in the exercise of their functions? The jury do not look into the record. It is not read to them. They are scarcely informed of its contents. They hear the testimony and arguments of counsel, and take the points in dispute from the Judge. He tells them that they are to pass upon certain questions of fact. That is all they know of them.

The most accurate analysis of a cause takes place at the trial, and then there really is something analogous to the ancient oral pleading. Indeed, we must not forget that our system of pleading had its origin in a practice which no longer exists. Being carried on orally by the parties, in the presence of the Court, it rested always under its supervision. It was, in fact, nothing more than the forming of an issue, by the Court, from the respective allegations of the parties.

When the presence of the Judge was withdrawn, it lost an essential part of its original character. The substitute for that now is the trial. First, the plaintiff opens his case, and calls his witnesses; the defendant then does the same. After the testimony is finished, the defendant goes over his case again, and makes his analysis of the points and of the evidence. The plaintiff follows with his analysis and arguments, and upon this the Judge charges the jury. Then comes the true analysis of the case—the fullest development of all the points in the controversy, which no system of special pleading can dispense with.

We must not infer the nature of the questions which the jury may have decided from the form of the verdict. The technical has been confounded with the real issue, and there has been the source of most of the errors on the subject. It would be leaving everything at loose ends, it is said, to permit the jury to pass upon the allegations at large, contained in a complaint and answer. But is not that opinion founded on an illusion? Is the form of a general verdict anything more than

a mere *formula*? A finding for the defendant or the plaintiff signifies that the jury have taken into consideration all the questions which the Judge has submitted to them, and upon the whole have agreed to a general verdict. They might just as well, and with no greater trouble or delay, find a special verdict, and write out all the disputed facts as they find them. So far, then, as the jury is concerned, I think we may safely rest in the conclusion that the production of common-law issues does not help them.

"But does it not help the Judge?" it may be asked. "Does it not assist him in making the analysis which he is to present to the jury?" Now, it must be admitted that if an accurate analysis could be made for him beforehand it would assist him. But the common-law pleadings do not make this accurate analysis. And the complaint, answer, and points, which I propose, would prove vastly better instruments of doing it than any series of pleadings at common law. From those he would get more information of the precise points in controversy than these could ever afford him.

So far we have considered the question without reference to the expense and delay of the old system of pleading. These are, however, important elements in the question. To do justice with the least expense and delay is, I repeat, the object of every administration of law. It has been said that it is better to have a Judge decide wrong, than not to decide soon. Without going so far as this, I must think time one of the most important elements in the proper administration of justice. Suppose it were certain that a cause would be better decided if the parties were allowed five years to get their proofs, and the Court five years to decide: who would think of allowing any such thing? The expensiveness of lawsuits is also a consideration of immense consequence. Dear justice is no justice to the largest class of litigants.

When, therefore, we consider at how great a delay and expense the common-law system of pleading must be enforced, there would seem to be no room for doubt or hesitation on the subject. The rules can be enforced only by demurrer, or by motion of the Court. In either case, the party who has made a slip must be allowed to amend; so that, after the argument,

the parties are just where they began. The pleadings are amended, and the parties start anew. The Court have been deciding an hypothetical case, perhaps, and the cause will reappear before them upon some new question.

Look at the list of decisions of the Supreme Court, at the end of any term, and you will see many on demurrers. I have now before me those of the October term, 1841. Here, out of ninety-nine cases decided, sixteen were upon demurrer; twelve decided for the plaintiff, two for defendant, and two in which some point in the case was decided for each party. None of these decisions was final, leave to amend being given in every one of the cases. The amendment was made, of course, whether the party could make his case better or not, if delay was his object. As a practical question, therefore, we must consider not only whether the common-law rules of pleading would be useful if they were observed, but what are the means to enforce their observance.

If we adopt the plan of pleading which I propose, we shall save both time and expense. We shall avoid the risk of losing causes from mistaking the rules of pleading; and we take one step, and that a great one, toward introducing simplicity and directness into the machinery of the law.

Should it be objected that there is an advantage of pleading, not yet considered, in its contributing to the completeness of the record, the objection is susceptible of an easy answer. A record is a memorial of the transaction, the history of the lawsuit. Its object is to preserve the evidence of rights legally determined, for two purposes: one, to insure to the prevailing party the fruits of the judgment, and to protect the losing party from a repetition of the claim; the other, to inform superior courts of the grounds of decision. To accomplish these objects, it should seem to be necessary only to keep a record of the plaintiff's complaint, the defendant's answer, the decision made, and the reason of it. Putting the complaint and answer upon the record, with the judgment and the reasons, will constitute an ample history of the transaction.

Two objections have been made to the abolition of the present modes of pleading, of so singular a nature that I can not pass them over. I have been told, I know not how many times,

that it would lessen the learning of the profession, and reduce the Courts to the level of justices' courts.

And is, indeed, the learning of the profession bound up with the system of common-law pleading? Is the noble science of jurisprudence—the fruit of the experience of ages, at once the monument and the record of civilization—inseparable from such paltry learning as that, “after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance,” or that “upon a traverse issue must be tendered,” or anything of that sort? Lawyers have enough to learn if their studies are confined to useful knowledge. To assert that the great body of the law, civil and criminal—the law which defines rights and punishes crimes; the law which regulates the proprietorship, the enjoyment, and the transmission of property in all its forms; which explains the nature and the obligations of contracts through all their changes; the law that prevails equally on the sea and the land; the law that is enforced in courts of chancery and courts of admiralty, as well as in the courts of common law—to assert that this vast body of law requires the aid of that small portion which regulates the written statement of the parties in the courts of common law, is to assert a monstrous paradox, fitter for ridicule than for argument.

When it was said by Lord Coke that “pleading was the truest guide to the knowledge of the common law,” he could not have referred to the rules of pleading merely as such; he must have referred to those treatises which included also the learning of rights, remedies, and defenses. In this sense pleading is a guide to the knowledge of law, just as a treatise on evidence is a guide to it. Sir Matthew Hale, a greater than Coke, said, not long after, that the Judges and pleaders had become “somewhat too curious,” and that the science had “degenerated from its primitive simplicity, which (how these latter times have improved!) the length of the pleadings, the many and unnecessary repetitions, the many miscarriages of causes upon small and trivial niceties in pleadings, have too much witnessed.” Of admiralty law it has been said in its praise that “it rejects altogether in its pleadings these technical niceties of the common law, and requires only that the substantial

merits should be set forth, in forms that are peculiar, indeed, but wholly liberal and unembarrassing."

Many of the rules of pleading, I am ready to admit, are logical; but a logical exercise, however proper for young men in a college, is not a very proper exercise to be had at the expense of litigating parties. Logic can be taught in other ways, and at a less expense. Some of the rules, however, are very unphilosophical. Take, for instance, that which required the party to plead single. Before the statute of Anne, the defendant could plead—such was the rule—only one plea, because, said the schoolmen who framed the rules, one answer is as good as twenty, and the jury can answer only one question. This was very well if you only took it for granted that the defendant was omniscient, and the witnesses, the Court, and the jury infallible. The defendant then would know exactly the state of facts and the law, so that he could not possibly choose the wrong defense, the witnesses would never forget, and the Court and the jury would always decide correctly. It was, however, discovered that sometimes the defendant did not know everything, and that mistake was possible even to witnesses, juries, and Courts. To provide against it, the rule was not abrogated, but evaded, by allowing, instead of several defenses in one plea, several pleas, each containing a defense.

Look at the result of other systems. Is the common-law bar of England more learned than its chancery bar? Will Doctors Commons bear no comparison with Westminster Hall in the learning of the advocates? Was Romilly less a lawyer than Sergeant Williams? Was Lord Stowell less than Lord Kenyon? Is it found that the common lawyers are more learned than the civilians? Were Coke and Eldon greater than Pothier and D'Aguesseau? And, in our own country, is the bar of New Orleans at the present time behind the bar of New York?

As to the other objection, that our superior courts would fall to the level of justices' courts by changing the forms of written pleadings, it proceeds upon the extraordinary assumption that the dignity and decorum of a court depend upon what passes in writing between the parties beforehand. If there be any connection between the two things, I am unable to see it.

The dignity of a court depends not upon such matters, but upon him who sits upon its seat of judgment—upon his learning, his character, and his manners. Compare one of our common-law courts in the City Hall, sitting for trials, and the District Court of the United States, sitting in admiralty; where is there most decorum, most order?

The change which I recommend can not affect, in the slightest degree, the substantial rights of any party. No rule of law by which rights and injuries are judged will be touched, the object and effect of the change being simply the removal of old obstructions in the way of asserting the rights and redressing the injuries.

It may, perhaps, be objected that the rules respecting the parties in equity and at law are different. This is true. They are different. But they need not be different. In all cases and in all courts a suit should be instituted in the name of the real party in interest. The present rule respecting parties at law, where it differs from that in equity, is artificial, unreasonable, and ought to be changed.

The common law prohibits the assignment of a thing in action. Equity allows it. The courts of law require the suit to be brought in the name of the assignor or his representatives, though he has long parted with all his interest in or control over it, and then they resort to all sorts of contrivances to protect the interest of the assignee, though they will by no means allow his name to appear upon the record. Therefore, if the assignee sues at law, he is turned out of Court without ceremony; and if the assignor sues in equity, he is turned out of that Court with as little. This is excellent law, but it is monstrous reason. The sooner the rule is abolished the better. If an assignment is good for one Court, it should be good for all. Keeping up the distinction tends only to embarrass suitors and bring discredit on the law, without doing ever one particle of imaginable good. So, also, as to trustees of estates and *cestui que trusts*. Whatever estate or interest a man has, if he have received an injury, let him claim redress in his own name and on his own account, in the same way as other persons claim it.

Then, as to those intermediate or interlocutory remedies, which are resorted to in equity to protect the rights of a party

during the litigation—the issuing of an injunction, the appointment of a receiver, and the like—they can continue to be applied under this new scheme of pleading, in all suitable cases, just as they now are. If the case be proper for an injunction, the Court will grant it, as it is now granted, upon filing the complaint. On the coming in of the answer, it may be dissolved or continued. Then, if the complaint shows a proper case for a receiver, *ad interim*, one may be appointed in the same manner as at present. So of the writ of *ne exeat*. Whenever such a writ is proper, it may be issued as it is now issued. In short, the form of the proceeding will admit of any relief, interlocutory or final, which can now be granted.

Let me illustrate what I propose by two examples of a complaint, one for an equitable, the other for a legal demand.

Take the case of an equitable demand; a suit by a *cestui que* trust against a trustee for breaches of trust, where no person is interested but the trustee and *cestui que* trust:

SUPREME COURT,  
A. B. vs. C. D.

A. B. complains: That C. D. having, on the — day of —, A. D. —, by an instrument then duly executed by all the parties therein named, of which a copy is hereto annexed, taken upon himself the execution of the trust therein mentioned, has, nevertheless, committed the following breaches of trust. . . . Wherefore, the said A. B. prays that the said C. D. may be restrained by injunction from any further disposition of the trust property, compelled to make to the said A. B. compensation in damages for the said breaches of trust, removed from the trust, and another trustee appointed in his place. Dated, etc.\*

\* The ancient bills in Chancery were very short. Here is one of them, filed in the reign of Henry V :

*“To the Reverend Father in God, the Bishop of Winchester, Chancellor of England:*

*“Beseecheth humbly your poor orator, John Bell, of Calis, soldier, and Katharine, his wife, that, whereas William atte Wode, otherwise called William atte Donne, of Rochester, father to the said Katharine, since dead, heretofore was seized in his demesne as of fee of one messuage with the appurtenances in Rochester, situated in the church yard there, the which William, in the feast of St. Michael, in*

Now take the case of a legal demand on a promissory note:

SUPREME COURT,  
A. B. *vs.* C. D.

A. B. complains: That C. D. having, on the — day of —, A. D. —, by his note in writing, for value received, promised to pay to the said A. B. one thousand dollars in ninety days from the said day, has, nevertheless, neglected to pay the same. Wherefore, the said A. B. prays that the said C. D. may be compelled to make to him compensation in damages for such neglect. Dated, etc.

If a uniform course of pleading in all cases be, as I think I have shown it to be, practicable, is it not desirable? The present loose manner of pleading in common-law cases can not be continued. The general issues are a snare to the parties, and a screen to the abuse of their power by courts and juries. It will never be possible to separate the questions of fact from the questions of law, or prevent courts and juries from encroaching upon each other, till the pleadings on both sides shall be special; not special in the old technical sense, but special as opposed to general. The allegations must be particular and precise, and made under the sanction of an oath. Then, and

the twenty-second year of the reign of King Richard the Second, since the Conquest, let to farm to one Simon Stethard, of Gillingham, the same messuage with the appurtenance for term of seven years then next ensuing, for a certain sum to him annually to be paid; the which Simon within the first two years was ousted by the executors of the said William, because he would not attorn to them in the payment of the rent of the same messuage, the which messuage since then was several times alienated to divers persons, and now so it is, very gracious lord, that one Piers Savage, now occupier of the same messuage, for the which messuage he hath not paid more than one mark, hath oftentimes been required to deliver to the same John and Katharine this same messuage as the heritage of the same Katharine, and he hath not delivered it to them, nor yet will, but detains it in destruction of their poor estate, and perpetual disherison of the same Katharine, if they should not obtain remedy by your gracious aid in this behalf, and the which John and Katharine are so poor, and the said John so ill, that they cannot pursue the common law. Please your very gracious lordship to consider the premises, and thereupon to grant a writ directed to the said Piers, to appear before you at a certain day upon a certain pain, by you to be limited, for to answer of the matter aforesaid, and to do right as good conscience demandeth it, and this for love of God and in work of charity."



then only, shall we have a useful and rational system of special pleading.

We have to choose between retaining the present forms of action, making the pleadings special in all cases, in conformity, however, with the established forms, as they have done in England, and abolishing the forms making the pleadings special, in conformity only with the facts. The former will require the distinction between law and equity to be continued. The latter will abolish the distinction and unite the jurisdictions.

Is it wise to keep up the distinction? I do not ask whether it be wise to keep a court of equity, supposing the forms at law to be fixed and unalterable; for it appears to me that any administration of justice, according only to the narrow forms of the common law, must always be imperfect; and that the supplementary remedies of equity are in that case indispensable; but I ask whether, supposing a new system about to be established, or changes made, great as are now inevitable, it be wise to perpetuate the distinction; in other words, whether two different systems of remedies be in themselves a good? To this question, I apprehend, there can be but one answer. Lawyers may disagree about the changes proper to be made in an established order of things, but they can not disagree about the inherent vice of two different and conflicting systems of law for the same people. They may think the evil not so great as is imagined, or easier to bear than the evils of change, but they can not think the existence of the two systems, side by side, a good thing in itself.

The objections to the distinction between the law and equity are, first, the difficulty of fixing in all cases the limits of the respective jurisdictions; and, secondly, the frequent necessity of going through both courts to determine one controversy.

Often enough, no doubt, we hear it said that the jurisdictions are well defined, and that it must be one's own fault if he mistakes them; but any man much conversant with the Courts knows perfectly well that there is often great doubt about it. The lawyers must be few who have not sometimes felt embarrassed in deciding upon the forum. I have been struck with the frequency of the argument made at the bar that the party has mistaken his remedy. There is a class of lawyers whose

favorite argument appears to be, either that the plaintiff has mistaken the forum, or that the defendant, if he has a defense, can assert it only in another Court. If one were to listen much to these gentlemen, he might be tempted to think that, in their opinion, at least, nobody knew anything about the jurisdictions but themselves.

Recollect the New York assessment cases. Bills in equity were filed to restrain the corporation of this city (New York) from selling land under assessments alleged to be illegal. The jurisdiction of the Court was maintained, upon what were thought to be unanswerable reasons, by the Vice-Chancellor, the Assistant Vice-Chancellor, and the Chancellor. A great many bills were filed, until the Court of Errors at last discovered, or thought it discovered, that there was no jurisdiction in equity. Of course, the bills fell to the ground, and the parties who had filed them, not suspecting that the Bar, the Vice-Chancellor, the Assistant Vice-Chancellor, and the Chancellor, were all mistaken on the question of jurisdiction, found themselves suddenly dismissed from the Court, with costs and expenses charged upon them—enough in the aggregate to support the whole judicial establishment of the State for years. Is not any system wrong which leads to this?

The other objection to the two jurisdictions, that is, the frequent necessity of calling on both to determine one controversy, is still stronger. Is it not a shame to keep our machinery of justice so imperfect that one Court is incapable of deciding the whole of a cause? Every bill that is filed in aid or defense of a suit at law is a reproach to our legal system. So is every creditor's bill. Notwithstanding the rules of courts of equity, that when they have required jurisdiction for one purpose they will retain the suit, so as to do complete justice between the parties, there are numerous instances in which a party is sent back to law after having got all a court of equity could give him. And the instances are more numerous still of parties driven into a court of equity to obtain full relief after having exhausted all the powers of a court of law. Not unfrequently, indeed, it happens that there are different parts of the same claim, one of which appropriately belongs to a legal tribunal, and the other to an equitable one. Cases of this sort must

have occurred to most lawyers. Here is one, for example, which has just occurred : An assignment was made by a debtor, engaged in printing for a corporation, of all sums of money that might become due to him for his work. So far as it embraced work already done, the assignment was held to be good at law, and therefore that a court of equity had no jurisdiction to enforce it ; but, so far as it embraced work to be done, it was good only in equity, and a court of law could give no remedy.

All this would be done away with by adopting a uniform course of procedure in all cases ; and nothing short of that will do it. The vesting of the two jurisdictions in the same tribunal will prove of no advantage if the jurisdictions themselves are kept distinct by different modes of procedure. The union of law and equity in the Supreme Court was regarded with the most opposite feelings by different members of the profession, some looking at it with much favor, others with the utmost dislike. If, however, it is to be simply a grant of the two separate jurisdictions to the same Judges, not a blending of the jurisdictions in one harmonious system of procedure, the friends of reform will have gained nothing. They will rather have lost, because the same Court can not work with the two machines so dexterously as two courts, one with each. The real good which the Convention appears to me to have done was the taking a step which should lead to a blending of the jurisdictions. When it is certain that the same man must sit to administer the two kinds of relief, it will soon be seen that there is no real necessity for the different forms of administering it. As a movement toward that desirable end, the friends of reform were glad to see it ; but, if it were to stop there, it would be worse than nothing.

It has been supposed by some persons that the Constitution debars the blending of the two jurisdictions ; but I think an examination will show that this supposition is without any just foundation. The clauses which relate to the subject are these :

SECTION 3. "There shall be a Supreme Court, having general jurisdiction in law and equity."

SECTION 5. "The Legislature shall have the same power to alter and

regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed."

SECTION 10. "The testimony in equity cases shall be taken in like manner as in cases at law."

SECTION 14. "... The Legislature may confer equity jurisdiction in special cases upon the County Judge."

SECTION 24. "The Legislature, at its first session after the adoption of this Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time."

The subject was considerably debated in the Convention. Mr. O'Connor contended explicitly for a uniform course of proceeding, or at least that all reference to the distinction between law and equity, or recognition of it, should be avoided. Some other members favored his opinion, others opposed it; the majority agreed upon the articles as they now stand, without committing themselves to an opinion on this subject one way or the other, preferring, as it appears to me, to leave it to the Legislature. However that may be, we have the provisions before us, and must construe them according to their manifest import.

Do they go further than to recognize the existing distinction between law and equity? I do not see that they do. The design of the third section was to confer general jurisdiction in all cases. To make the expression comprehensive, the two classes into which cases are now divided are mentioned, so as to leave no doubt that both of them are given to the new Court. The tenth section has in view merely the prohibition of a distinction in the taking of testimony. It neither commands nor prohibits a distinction in other respects. The fourteenth section permits the Legislature to confer on the County Judges some portion of the jurisdiction now known as equitable. Then, the fifth and twenty-fourth sections appear to me to point manifestly at a revision of the whole subject by the Legislature, and leave with it the power to regulate the jurisdiction and the procedure as it sees fit, with the single qualification that it can not divest the Supreme Court of its general jurisdiction. Certainly it is a most strained construction, that

the Constitution commands different modes of procedure in the two classes of cases.

If such reforms as I have recommended are ever to be made, this is the time to make them. The changes that are inevitable in equity cases lead naturally, as it seems to me, to all the rest; for, the Constitution enjoining the taking of testimony in those cases in like manner as at law, must lead to a similar mode of trial. When a mode of trial is found for cases in equity similar to that used in cases at law, it will then be seen that the pleadings in the two classes of cases can be framed in the same way. The pleadings in equity being framed on simple and just principles, will naturally serve as a model for the rest. Nothing will prevent it but their present length and particularity. But these will disappear as soon as they cease to be used for obtaining testimony by means of a discovery. That this ought to be accomplished without delay, I hope I have shown.

Six sections like the following, incorporated into the new code of procedure, with a few forms annexed, would contain all the provisions necessary to establish the course of pleading, which I propose in all civil cases :

§ 1. The first proceeding shall be a complaint filed with the Clerk of the Court, setting forth briefly, in ordinary language, and without repetition, the nature and particulars of the cause of suit, and praying for the relief to which the complainant thinks himself entitled. It may be in the form set forth in the annexed schedule, or in any other brief and simple form. It shall be verified by the affidavit of the complainant, or, in his absence, his agent, to the effect that he believes it to be true.

§ 2. Within ten days after the day of appearance, the defendant shall file with the Clerk of the Court his answer to the complaint, setting forth briefly, in ordinary language, and without repetition, the nature and particulars of his defense. But further time to answer may be granted by a Judge of the Court, for good cause shown. The answer may be in the form set forth in the said schedule, or in any other brief and simple form. It shall be verified by the affidavit of the defendant, or, in his absence, his agent, to the effect that he believes it to be true.

§ 3. No other pleading shall be allowed than the complaint and answer aforesaid, and, upon the filing of the answer, the cause shall be deemed at issue. If the defendant shall neglect to file his answer within the time aforesaid, the allegations of the complaint shall, for the purposes of that suit, be taken to be true. And when an answer is filed containing new matter, not responsive to the complaint, the Court may require from either party notice of any other facts, intended to be proved on the trial, relating to such new matter.

§ 4. The defendant shall not be required to make any discovery by answer, nor shall the answer, in any case, be deemed evidence against the complainant. But any party to the suit may be examined as a witness at the instance of the opposite party, and for that purpose he shall be subject, like any other witness, to subpoena, to examination conditionally, or upon commission.

§ 5. The Court shall have power at any time, in its discretion, to amend any process, pleading, or proceeding in furtherance of justice, taking care to guard the parties against injury from surprise, by correcting any mistake in the name of any complainant or defendant, or by adding or striking out the name of any complainant or defendant, or by conforming any pleading or proceeding to the facts proved, whenever the variance between the allegation and the proof is not material to the right of the case. And the Court may also compel the parties respectively to amend the complaint or answer for want of sufficient precision therein; and the defendant may be allowed, in the discretion of the Court, and after notice to the complainant, to file a supplemental answer containing any new defense occurring after the former answer. And the Court may, also, upon the trial, disregard any variance between the allegation and the proof not material in substance.

§ 6. All suits shall be brought in the name of the real party in interest, and against the party as to whom relief is prayed.

If I have in any degree accomplished what I have attempted, I have shown—

*First.* That great changes in legal proceedings are now inevitable, and that in making them it is as easy to build anew from the foundation as to add to and repair what is old.

*Second.* That the practice of examining a party by bill and answer is inconvenient, dilatory, and expensive, and need not be continued, because an examination, oral or upon interrogatories, will serve at least as well, and with much less trouble, delay, and expense.

*Third.* That as soon as the discovery by bill and answer is abandoned, these pleadings will become, in all cases, what they are now in those where the oath of the defendant is waived, simple statements by each party of his own case, and if required to be verified by oath, will be concise, and produce a sufficient issue.

*Fourth.* That the same mode of pleading can be used in common-law cases; and, therefore, the present forms of action and pleading should be abolished, and that mode substituted.

*Fifth.* That equitable relief, as distinguished from legal, has been made necessary only because of the fixed forms of the common law; that those forms do not in any degree conduce to the attainment of justice, but are a hindrance and a snare.

*Sixth.* That none of the changes which I have recommended can prejudice in any respect the rights of the parties, but will make the assertion of those rights less difficult, less dilatory, and less expensive.

I lay out of view the advantage that this change would be to the profession itself. This is altogether too narrow a view of the question, although I think it quite apparent that the real usefulness and dignity of the profession would be increased by it. The practice is now too technical. It requires a vast amount of drudgery to be performed; too many and too long papers; too many steps to be taken; too many motions to be made. In short, instead of a straight path to an object in sight, we have to grope our way through a labyrinth of old passages, some of them in decay, some of them dark, many of them blocked up, and quite uncertain when we shall emerge to the light. Most fervently do I hope that the year 1847 will see this labyrinth uncovered and demolished.

THE CODE OF PROCEDURE.

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## MEMORIAL TO THE LEGISLATURE,

FEBRUARY, 1847.

THIS memorial was drawn by Mr. Field, and, at his request, signed by fifty members of the New York Bar. It was speedily followed by the desired legislation.

*To the Senate and Assembly of the State of New York :*

The memorial of the undersigned, members of the bar in the city of New York, respectfully represents that they look with great solicitude for the action of your honorable bodies in respect to the revision, reform, simplification, and abridgment of the rules and practice, pleadings, forms, and proceedings of the courts of record. They are persuaded that a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of the people; that a uniform course of proceeding in all cases legal and equitable is entirely practicable, and no less expedient; and that a radical reform should aim at such uniformity, and at the abolition of all useless forms and proceedings.

Your memorialists, therefore, pray your honorable bodies to declare, by the act appointing Commissioners, that it shall be their duty to provide for the abolition of the present forms of action and pleadings in cases at common law, for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of every form or proceeding not necessary to ascertain or preserve the rights of the parties.

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## FIRST REPORT OF THE PRACTICE COMMISSION,

FEBRUARY 29, 1848.

THE following are selections from reports and notes prepared by Mr. Field as Commissioner on Practice and Pleadings. In some instances extracts only are given, but nothing is here reproduced which was not written by him. The signatures of the Commissioners are omitted.

*To the Legislature of the State of New York:*

The Commissioners on Practice and Pleadings beg leave to present their first report.

The general duties imposed upon the Commissioners are declared by the twenty-fourth section of the sixth article of the Constitution, which requires the Legislature, at its first session after the adoption of the Constitution, to "provide for the appointment of three Commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time."

In the act which was thereupon passed, creating the commission, the duties of the Commissioners are more explicitly defined, the eighth section declaring that they shall "provide for the abolition of the present forms of actions and pleadings, in cases at common law; for a uniform course of proceedings in all cases whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable, and of any form or proceeding not necessary to ascertain or preserve the rights of the parties."

The present report is designed to accomplish this reform so far as the subjects embraced in it are concerned, and so far, also, as a careful examination of the important subject committed to their hands, and a due regard to the responsibility under which they act, have as yet enabled them to submit in detail any portion of their labors for the action of the Legislature.

To say that the reforms thus enjoined upon them were such as their own judgment approved, is but to repeat what is already known to the Legislature. In accordance with their own convictions, and in the spirit of the law, they have prepared the portion of the system which is now submitted. Though compressed within a narrow compass, it reaches far, and sweeps away the needless distinctions, the scholastic subtleties, and the dead forms which have disfigured and encumbered our jurisprudence. If the performance be equal to the intention, they will have relieved Justice from many of her shackles, and opened the way for a thorough reform of remedial law in all its departments.

As will be perceived, the present is but a report in part. It relates only to the proceedings and pleadings in civil actions, and to such changes in the jurisdiction and functions of the courts as seemed necessary to develop and bring into successful operation the important reforms which have constituted the chief object of the present labors of the Commissioners.

The magnitude of the task which yet remains for them to perform can scarcely be understood but by those who have made the law their study. It is sufficient to say that, under the Constitution and the statute, the Commissioners see no other limit to their duty than to make full provision for every proceeding in the judicial tribunal from the beginning to the end of every controversy. The courts of justice, and all their officers, the time within which actions must be commenced, the mode of bringing the parties before the Court, their respective allegations, the trial of disputed questions of fact and of law, the summoning of witnesses, and the manner of their examination, including the question of their competency, and the rules of evidence, the judgment to be rendered, the execution of the judgment and appeals, together with the immense mass of special proceedings known to our law, prerogative and remedial writs, arbitration and processes against absent and insolvent debtors, and a revision of the practice, pleadings, and proceedings in criminal cases, all appear to be embraced in the comprehensive language of the Constitution. Acting upon this view, it is the design of the Commissioners to prepare a code

of procedure which shall comprehend the whole law of the State, concerning remedies in the courts of justice.

The result of their labors thus far is before the Legislature. They will proceed to execute the remainder of their work with as much rapidity as the nature of the service, the care with which it should be performed, and their own strength will allow, asking in advance, and confident of receiving, the indulgence and coöperation of the Legislature.

It will be perceived that the present report relates chiefly to actions hereafter commenced; it being thought indispensable to keep the old and the new systems of practice distinct. It is the purpose of the Commissioners to submit, as soon as possible, a temporary act, designed to facilitate the dispatch of the business now pending in the Courts.

With a view to anticipate as far as possible objections which may be made to any portion of the work, the Commissioners have inserted many notes—more, perhaps, and longer, than may by some be thought necessary, but which it was supposed might serve to furnish explanations, and answer arguments against the adoption of the reforms proposed.

### THE FORMS OF CIVIL ACTION.

#### *Extracts from the Notes to Title I, Part II.*

The chief object of this title is to declare the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which, in our judgment, very few, if any, essential reforms can be effected in remedial law. We refer to the abolition of the distinction between actions at law and suits in equity, and of the forms of such actions and suits. This principle it is proposed to declare by section 62, which provides that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."

✓ In our remarks upon this section, we shall consider separately the two propositions which it involves. -

✓ The first is the abolition of the distinction between actions at law and suits in equity. ✓ The separate jurisdictions of law and equity, exercised by distinct tribunals, as they existed in this State up to the adoption of the new Constitution, were borrowed from similar institutions in England, with such modifications as the genius of our people rendered necessary. In the early history of the English law, there was but one system of jurisprudence, and one form of tribunal by which it was administered. We refer to the courts of common law. In the progress of time, the unbending rigor of common-law rules was found to be a grievance which rendered necessary the exercise of some judicial power, by which the severity of the common law might be relaxed. The establishment of the Court of Chancery, the original design of which was to soften the rigor of the common law, and to do complete and perfect justice by means of the peculiar forms of proceedings with which it was invested, where injustice would otherwise have followed, was the result. In the exercise of its functions, new principles were adopted, new modes of proceeding devised, and powers (some of them exclusive of, and others concurrent with, the courts of law) became the means by which its jurisdiction was administered.

With these attributes, that Court was incorporated into the judicial establishment of this State; and, until it was abolished by the new Constitution, it continued to exist, and to exercise substantially the same powers as are exercised by the Court of Chancery in England. Its forms and modes of proceeding, not merely in enforcing the substantial rights of parties, but in the ordinary proceedings by which suits were conducted, were essentially different from those of the common-law courts; and, not merely in the formal conduct of litigation, but in the substantial rules by which rights were to be determined, it had built up as distinct a system as it is possible to conceive. The result was, in this State as it has ever been in England since the separate establishment of this Court, a conflict of jurisdiction, and a difference of judicial opinion, as to the precise boundary which separated the powers of law and equity, leading to a call,

on the part of the people, for such a course of measures as would insure the attainment of substantial justice, and remove the embarrassments in the organization of the judiciary establishment, by which there was good reason to fear it had too often been defeated. . . .

It is, therefore, no matter of surprise that the books are filled with cases, in which the injustice has been imposed upon parties of suffering the loss of a substantial right, because of a mistake in the choice of a forum before which its enforcement was sought. If it were necessary, scores of cases might be cited in which, after a long and protracted controversy upon the merits, the cause ultimately turned upon the question of mistaken jurisdiction. . . .

The object of every suit, so far as modes of proceeding are concerned, is to place the parties, whose rights are involved in it, in a proper and convenient manner, before the tribunal by which they are to be adjudicated; to present their conflicting allegations plainly and intelligibly to each other and to the Court; to secure by adequate means a trial or hearing of the contested points; to obtain a judgment or determination adapted to the justice of the case; and to effect the enforcement of that judgment by vigorous and efficient means. This object is not peculiar to any form of remedy, whether it be legal or equitable, or whether it fall within any one of the subordinate classes of actions, as they now exist at law, but is common to all. That it can be practically attained in every species of controversy, so far as the mere formal and progressive steps in the conduct of suits is concerned, we are thoroughly convinced; and with a confidence, we trust not unbecoming, we present the subsequent provisions of the proposed act as well adapted to carry out that object. . . .

It seems to us clear that neither the forms of remedies nor the mode in which they are stated require the complexity in which both are now enveloped. The embarrassments to which they have given rise have resulted from no difficulty in determining the real rights of parties, but simply in the means of enforcing them; and in this respect, we feel no hesitation in recommending that the retention of forms, which serve no valuable purpose, should no longer constitute a portion of the

remedial law of this State. Let our Courts be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the question whether the party has conformed himself to the arbitrary and absurd nomenclature imposed upon him by rules, the reason of which, if they ever possessed that quality, has long since ceased to exist, and the continuance of which is a reproach to the age in which we live.

### PARTIES TO CIVIL ACTIONS.

#### *Note to Title III, Part I.*

The rules respecting parties in the courts of law differ from those in the courts of equity. The blending of the jurisdictions makes it necessary to revise these rules to some extent. In doing so, we have had a threefold purpose in view: first, to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; second, to require the presence of such parties as are necessary to make an end of the controversy; and, third, to allow otherwise great latitude in respect to the number of parties who may be brought in.

The common law prohibited the assignment of a thing in action. It did so for an artificial reason, which is not applicable to our circumstances. The courts of equity, on the other hand, allowed and protected the assignment. The consequence was, that the assignee could bring a suit in equity upon the demand assigned, while the law looked upon him as having no rights in regard to it, and forbade his appearance in its courts.

Finally, with the increase of commerce, and the spread of more liberal opinions, the common-law courts began to look upon the assignee with some forbearance, and winked at the assignment, so far as to deny the right of the assignor to release the debt; but they still refused to recognize the right of the assignee to sue. So this is the condition of the parties: if the assignee sues at law, he is turned out of the Court; and if the assignor sues in equity, he is turned out also. If at this moment, any member of the Legislature, to whom a bond

and mortgage had been assigned, were to go into the Supreme Court and sue upon the bond, he would have to sue in the name of the person who made the assignment, however much distrusted, or lose his case; but if he were to sue on the mortgage, for the foreclosure, he would have to sue in his own name, or he would not be heard. And yet it is the same Judge who sits in the two cases.

The true rule undoubtedly is, that which prevails in the courts of equity, that he who has the right is the person to pursue the remedy. . . .

The courts of law generally administer justice between those parties only who stand in the same relation to each other; while courts of equity bring before them various parties, standing in different relations, that the whole controversy may be settled, if possible, in one suit, and others avoided. This reasonable and just rule we would adopt for all actions. It is for the interest neither of the suitor nor of the State that there should be several suits to settle one controversy, so long as one will do it as well. We have had no hesitation in providing, therefore, as we have done by section 102, that when a complete determination of the controversy can not be had without the presence of parties not at first brought before the Court, the Court may direct them to be made parties.

Having prescribed these rules, we have intended to leave suitors very much at liberty to choose whom to make defendants, and whom to join as plaintiffs. No person can be affected by a judgment, but a party, or one who claims under him. This rule will make the plaintiff bring in all the parties whom he wishes to affect. The judgment, as we have provided by section 161, can be given for or against any one or more of the plaintiffs or defendants. This will save the plaintiff from the hazard now encountered in bringing in too many parties, except that of paying costs.

Upon the whole we venture to express our belief, that we have given rules on the subject of parties, which will remove many evils now existing, and which will be found neither too stringent for suitors, nor too loose for the purposes of substantial justice.

## FORMS OF PLEADING IN CIVIL ACTIONS.

*Note to Title VI, Part II.*

As has been already remarked, the change in the mode of pleading is the key of the reform which we propose. Without this we should despair of any substantial and permanent improvement in our modes of legal controversy. With it we think we can frame a code of legal procedure, simple in its construction, easily understood, and efficient for all the purposes of justice.

The pleadings, we have said, are the written allegations of the parties of the cause of action on one side, and the defense on the other. Their object is threefold: to present the facts on which the Court is to pronounce the law; to present them in such a manner as that the precise points in dispute shall be perceived, to which the proofs may be directed; and to preserve the record of the rights determined. Not one of these objects is gained by the law of pleading as it now exists in this State. They are all evaded.

Different modes of pleading are used, according as the case is of legal or of equitable cognizance. We have already explained their history.\*

## TRIAL AND JUDGMENT IN CIVIL ACTIONS.

*Note to Title VIII, Part II.*

We have included trial and judgment in the same title, because they are so connected in some cases that it is difficult to separate them. Thus in the case of trial by the Court, the judgment of the Court is given at the same time, upon both the facts and the law. To treat of the trial, in this instance, in one title, and the judgment in another, would needlessly lengthen and involve the provisions of the act.

The mode of trying issues of fact is the first point to be determined. The instructions of the Legislature, and our own judgment, lead us to seek uniformity. We have already pro-

\* Here follows an extended exposition of the new system of pleading, substantially identical with that set forth in the essay, "What shall be done with the Practice?" see p. 226.



vided a uniform mode of commencing actions, and a uniform mode of pleading. We think that there can also be a uniform mode of trial.

All that the Constitution has prescribed on the subject is contained in these two paragraphs :

"The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate for ever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law."\*

"The testimony in equity cases shall be taken in like manner as in cases at law."†

"The cases in which it has been heretofore used" are all cases at common law, except that a reference might have been ordered when the trial would require the examination of a long account. Therefore, in the old common-law cases there are to be two modes of trial: one by jury, as heretofore accustomed; the other by the referees, or the Court, when the parties waive a trial by jury. Can the same mode be adopted in that class of cases heretofore determined by the courts of equity? A trial by the Court or referees is equally applicable to both classes of cases. Courts of equity have heretofore tried causes themselves, or with the aid of masters. It is true that the testimony was in writing. But that appears to us an immaterial element in respect to this mode of trial, and, if it were otherwise, the Constitution has abolished it, and required the proofs to be taken orally, as often, and to the same extent, in equity as at law. Wherever, therefore, the parties waive a trial by jury, and a trial by the Court or referees is to be had, there may be entire uniformity between cases legal and equitable.

The mode of doing this is naturally suggested by the other modes of trial. The practice which now prevails in equity, of writing down the testimony, word for word, and sending it all to the Superior Court on an appeal, must be discontinued. If it be not, the mere taking of the testimony will occupy half the time of the Judges. The rapid examination which takes place on common-law trials before juries leads to the truth as surely as the slower process of other trials. A judge is as competent to estimate the weight of testimony as a juror, and can do it as

\* Article I, section 2.

† Article VI, section 10.

rapidly. More time, or a more careful record of the testimony, is not necessary for him. Nor is it necessary for any purpose. In case of an appeal upon questions of fact, so much of the testimony as may be necessary to present the questions may be stated in a case, as is now done in common-law actions. We perceive no good reason why it should not be so.

Whenever the questions to be taken to the Court above are questions of law, they may be presented on bills of exceptions, or cases, made from the notes of counsel, under the direction of the Judge, in this case, as well as that of a trial by jury. The Court is substituted for the jury. The same machinery may be applied to the one mode of trial which is now applied to the other. Bills of exceptions, cases, motions for new trials, on the ground of newly discovered evidence, will be equally appropriate in both cases.

The point admitting of most debate is this: how far a determination of the facts by one court on a trial had before it, without a jury, should be subject to revision. That it should be so to some extent we can not doubt. The power of determining the facts, vested in a single judge, without appeal, would be liable to abuse, and would be subject to great suspicion, whether abused or not. But how far this right of appeal upon the facts should be allowed, or whether it should be co-extensive with the right of appeal upon the law, or might be safely and justly limited to less, is a question of some moment. We are inclined to the limited appeal, because the issues of fact are in general not the most difficult, and an examination by two courts creates as great a probability that justice has been done as can ever attach to the verdicts of juries.

For the purpose of revision, we propose that a case be made containing so much of the evidence as is material to the questions to be raised. The cases now made, at law, on motions for new trials for insufficient evidence, are supposed to present and do in fact present the evidence correctly. It is not necessary, to a proper judgment upon the facts, that the whole of every question and of every answer should be written down. A condensed statement of the evidence presents it as fairly, and to the Court more acceptably, because more easily examined.

There remains, then, but the case of a trial by jury. And the inquiry is narrowed down to this: Can it be adopted in both classes of cases? Or, in other words, where a uniform mode of pleading is used, will not the trial by jury be applicable as well to that class of cases heretofore denominated equitable as to that denominated legal?

The contrary supposition implies, either that there is something in the nature of equitable cases which unfits them for that mode of trial, or that the form of the pleadings is unsuited to it. We have already endeavored to show, in the note to section 118, that the form of the pleadings in common-law cases can be radically changed, and made uniform with those of equity, without in any degree impairing their fitness for jury-trial. If we were right in that, then the obstacle, if there be any, is not in the form of the pleading, and the only remaining inquiry is, whether there be anything in the nature of the cases distinguished as equitable which unfits them for that mode of trial.

If there be, it must arise either from the nature or from the number and variety of the questions. It can not be the former, because a jury can determine the questions of fact in one case, as well as the other. Is it, then, the latter? It is, we know, objected frequently and earnestly that the number and variety of the questions of fact in equity cases make it inexpedient, if not impossible, to submit them properly to a jury at a single trial. The objection assumes that the number of questions of fact presented by an equity case is greater than the number of questions in a case at law. Is this true, however; and, if it be true, is the difference so great as to make a different mode of trial necessary? We have taken pains to make a comparison, and think we are warranted in saying that the average number of real issues of fact is not greater in equitable than in legal cases.

If it were, however, considered greater, that would not be decisive unless it could be shown that it was greater than could be conveniently disposed of by jury, or greater than a jury is ever required to dispose of in a common-law case. This, however, can not be shown, for we know that common-law suits sometimes present a score or more of issues joined,

and that each issue may and does often really involve several questions of fact.

Then it is said that in equity cases there are many parties standing in different relations to each other, while in cases at law the parties are few, and all the plaintiffs stand in the same relations to all the defendants. They who make this an objection forget that by our present law, a plaintiff may sue in one action all the parties to commercial paper, however different may be their defenses, and however various their relations to each other. The holder of a protested bill of exchange may prosecute together all the drawers, acceptors, and endorsers, and one jury shall try all the issues. Can more than this happen in an equitable case?

We think, therefore, we are warranted in concluding that there is nothing in the nature of the questions, nor in the number and variety in them, which should prevent a uniform mode of trial in all cases, whether they be such as have been heretofore denominated legal or equitable.

The next point for consideration is, how, in respect of form, the questions should be submitted to the jury. Should they be left at large upon the complaint, answer, and reply, and under the instructions of the Court, or should they be reduced beforehand to the form of particular and detached issues? Either mode may be adopted. Our own preference is for the former. We think that there is no necessity for stating the questions before the trial, further than they appear in the complaint, answer, and reply. It can not be necessary to do so for the information of the parties or their counsel. They know what questions are in dispute from an examination of the pleadings. The same is true of the Court. And all that the jury need is to have the questions plainly stated, when the case is given to them. This is now done by the Judge in summing up, and to him we would leave it.

But we would authorize him to direct the jury in certain cases, where the questions may be complicated, to find a special verdict in writing, upon all or any of the issues; or, if they render a general verdict, to find upon particular questions of fact, stated in writing. This will have a tendency to give greater precision to the language of the Judge, enable the jury

the better to separate the questions, and prevent mistake and misunderstanding. Sometimes it may happen, perhaps, that the wrong issues, or immaterial ones, are put to the jury. But that often happens now, in the trial of cases at law, upon the strictest issues of which common-law pleadings are capable. The books are full of cases of new trials granted, because the Judge had put the cause to the jury upon some wrong or immaterial question. And if it so happens in ordinary cases, as now conducted, it can not be considered a serious objection that the same thing, though less frequently, may happen in a trial upon pleadings reformed as we propose. We make no scruple in saying that the new pleadings will be exposed to it in a much less degree, for the reason that the parties will be better acquainted beforehand with the really disputable points, and therefore more able to prepare for and point out to the Court and the jury those which are, and those which are not, disputed.

#### JUDGMENT FOR OR AGAINST ANY PARTY.

##### *Note to Section 230.*

The section referred to (230) provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the rights of the parties on each side as between themselves."

The object of this section is to prevent a failure of justice, when there happens to be too many or too few parties brought into Court. The questions arising on the nonjoinder or misjoinder of parties are the cause of much delay, vexation, and disappointment, resulting not unfrequently in an entire failure of justice. This section will prevent them hereafter. It is also designed to save the necessity of a second action between parties on the same side, where their liability over to each other depends on the result of the issue joined with their common adversary. As, for instance, if a recovery be had against the makers and endorsers of a promissory note in one action, the latter would be entitled, in the same action, to a judgment against the makers, or to be subrogated in the place of the plaintiff on paying his recovery.

## RELIEF GRANTED TO PLAINTIFF.

*Note to Section 231.*

Section 231 is as follows: "The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but, in any other case, the Court may grant him any relief consistent with the case made by the complaint, and embraced within the issue."

It will be recollected that the plaintiff is required to state, in his complaint, the relief to which he supposes himself entitled. It will sometimes happen that he mistakes that relief; if he do so, and the defendant do not appear, judgment ought to be given for that only which the plaintiff has demanded. If both parties appear, and the whole controversy be gone into, there seems to be no reason why the plaintiff should not have the relief to which he is entitled, though he may have mistaken it in his complaint.

## MEASURE OF DAMAGES.

*Note to Section 232.*

Section 232 is as follows: "Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action."

It now happens that the rate of damages recoverable in an action depends in part upon the form of the action. The form being abolished, it should seem to follow that the plaintiff ought to be enabled to recover any amount which he might have heretofore recovered in any form of action that he could have selected. To prevent uncertainty on this head, we have thought it best to declare the rule explicitly.

## APPEALS.

*Note to Title XI, Part II.*

While the Court of Chancery had a separate existence, the review of its decisions by the Court of last resort was accomplished by means of a proceeding styled an appeal, and that of the Supreme Court was reviewed by the same Court upon a

proceeding styled a writ of error. Under the new Constitution, the Court of Appeals succeeds to the Court for the Correction of Errors, and the present Supreme Court inherits the jurisdiction of the old Chancery and Supreme Court. By the Judiciary Act of 1847 for the organization of the new judiciary, the double system of review by appeal and writ of error was continued and made applicable to the new Courts. The circumstances of the case, however, warrant us in believing that it was adopted as a temporary measure, until time could be taken for a thorough revision of the whole system of appeals. That duty we have endeavored to perform in this title in connection with the provisions contained in the first part, relating to the Courts and their jurisdiction. We have substituted a uniform system of appeals in all actions, varying only according to the jurisdiction of the Courts and their peculiar organization. The security required on appeal has been adapted to the nature of the judgment appealed from, in analogy to that heretofore provided in the Court of Chancery.

#### SUBMITTING A CONTROVERSY WITHOUT ACTION.

##### *Note to Section 325.*

Section 325 provides for the amicable submission of a case agreed upon for decision without going through the regular forms of action.

The provision, it is believed, will be useful in many cases where a question as to legal right exists between fair and honorable men, there being no dispute about the facts. A final determination of such a case may be obtained in this way, not only quicker and cheaper, but in a manner more congenial to the feelings of the parties, than by an ordinary action at law; the latter being a process to bring an unwilling defendant to submit himself to the arbitrament of the laws.

#### COMPROMISING AN ACTION.

##### *Note to Chapter IV, Title XII, Part II.*

In a previous part of the act we have required the plaintiff in an action, arising on contract for the recovery of money

only, to specify in his summons the amount for which he will take judgment if the defendant fail to answer. In a case where the plaintiff has a just claim to a certain amount, which the defendant is not disposed to controvert, the specification in the summons enables the defendant to know whether that is all the plaintiff seeks, and, if so, he may, with perfect safety, permit judgment by default, as the law limits the recovery in that case to the amount specified. On the other hand, where the plaintiff has a conceded good cause of action for a certain amount, but claims a larger sum than the defendant is disposed to admit, and also where the defendant disputes the whole claim, but is willing to concede something by way of compromise rather than litigate, he may, under the provisions of this chapter, offer to permit judgment against him for such sum as he deems just, or is willing to give for peace; and if the plaintiff does not accept it, but carries on the action in order to recover a greater amount, he does it at the hazard of paying costs to the defendant if he shall fail to establish a greater claim.

This provision holds out inducements to both parties to make fair offers to each other for the purpose of avoiding a lawsuit, and makes it their interest to employ safe counsel, who will not advise a prosecution or defense without good cause. The same desire to avoid unnecessary litigation and promote conciliation between parties, that is manifested in the Constitution in authorizing courts of conciliation, will doubtless prompt the Legislature to adopt these conciliatory rules in conducting actions before the ordinary tribunals.

These remarks have particular application to the first section of the chapter, but are also appropriate to some extent to the two latter sections. In regard to these, however, the principal benefit hoped from them is to save the time of Courts and witnesses and the expense to parties in proving the amount of damages, in case the right to recover in the action shall be established.



## ATTENDANCE OF WITNESSES.

*Note to Section 356.*

The following note relates to a provision of the code that was inserted in 1848, but subsequently omitted, which provided that no witness should be compelled to attend out of the county where he resided or was served with process, but that he might be examined by special order of the Court.

Can there be a doubt that, under our present system, the rights of witnesses are grossly disregarded? Why should the law permit a person to be taken from Suffolk to Niagara against his will, and at great sacrifice, because two persons in Niagara have a legal dispute? The loss to the witness may be more than the whole subject of litigation. Does not the law in this case inflict a greater wrong that it may redress a less? We think it does; and we propose to prevent it hereafter by declaring that no person shall be taken hereafter out of his own county for another person's civil action.

The assimilation of legal and equitable proceedings should seem, moreover, to render some provision of this sort necessary. In cases of equity the witnesses, before the present Constitution, were examined before officers called examiners in chancery, distributed through the State near the homes of the witnesses. It was a regulation of that practice that no witness should be obliged to go more than forty miles to be examined. If all these witnesses are to be taken from their homes to distant counties to testify at the trial what they would before have testified before the examiners preparatory to the trial, the burden upon them will prove intolerable.

There should seem, moreover, to be no good reason to require the personal attendance of a witness at so great a sacrifice. No doubt his appearance upon the stand, where the testimony may be taken from his lips, is preferable to a written deposition taken at a distance. But that is not the only question. The point is this: whether the increased advantage to the parties of having the judge and jury see the witness is more than a counterpoise to the increased injury to the witness from being brought so far and at so great a loss. We think the question can be answered in only one way. In his own

county let him be called to the stand. If his testimony be wanted in another, let it be taken in his own and transmitted thither.

Should there be a really urgent occasion for the personal attendance of the witness, there can be little doubt that the party may be able to induce him to attend by compensating him for his expenses and time. So it is now where a witness is wanted from another State: the party makes an arrangement with him to come in many cases where his attendance is important. If a witness in Jersey City be wanted for a trial in New York, he can generally be induced to attend, though he can not be compelled to do so. So it will happen, we doubt not, if our plan be adopted. Certain we are that, in any event, the testimony of the witness will not be lost, because we compel him to attend before an officer in his own county and give the testimony in writing; and that is far better than to compel his attendance against his will, and at whatever sacrifice.

#### ENTITLING AFFIDAVITS.

##### *Notes to Section 367.*

This section provides that "an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made."

The section is intended to obviate an objection often made upon motions, that an affidavit is incorrectly entitled, and therefore should not be received. Thus it is said that if the affidavit to hold to bail be entitled in the suit which is to be commenced, it is bad, because there is no suit pending till the service of the writ. There should seem to be no good reason for requiring more than that the affidavit should refer to the action, so that it can not be mistaken.

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## SECOND REPORT OF THE PRACTICE COMMISSION,

JANUARY 29, 1849.

*To the Legislature of the State of New York :*

THE Commissioners on Practice and Pleadings respectfully submit herewith their second report.

It embraces the draft of an act making additions and amendments to the code of procedure adopted at the last session of the Legislature.

In presenting these amendatory provisions, the Commissioners deem it a proper occasion to submit some views immediately connected with the subject, and explanatory of the considerations by which they have been governed.

Upon their first assumption of the duties of their office, as prescribed by the Constitution and the law of their appointment, they felt conscious that they had undertaken a task of great labor and difficulty; they knew that its accomplishment would require patient and painful research and persevering devotion; they were aware, also, that the public opinion which had demanded the reform, would be tasked to the limits of its patience by the delay which must occur before its expectations could be realized.

They foresaw that the change from one system to another would of necessity lead to much embarrassment in the Courts, and in the business of the legal profession; that suitors and all persons connected with the administration of justice would experience delays and inconveniences while the change was in progress; they were prepared to expect the hostility of some and the discontent of others, consequent upon their personal relation to the business affected. But they took courage when they remembered that well-settled public opinion had issued its mandate in the most imposing form. The Constitution of the State commanded the action of the Legislature; that body in good faith, and fully participating in the general conviction of the necessity of thorough and efficient reforms, fulfilled its duty by organizing a commission, with positive instructions,

calculated to insure its object and meet the just expectations of the public and the requirements of the Constitution in their letter and spirit.

The first subject of consideration which presented itself to the Commissioners was the investigation of defects in the existing systems of practice and pleading with a view to their redress, and, under the instructions of the law of their appointment, to settle upon a plan best adapted to subserve the objects of legal procedure. . . .

The Commissioners have endeavored, both from a sense of obligation to the laws, and from their own convictions of their propriety, to abide their instructions and meet the just expectations of the people, whose opinions they expressed.

Nothing less than a thorough and entire revision of the whole system of legal procedure could accomplish this object. The basis adopted for their action was substantially that upon which courts of equity were originally founded; the natural course by which the means to be used are directed solely by the end to be attained, without regard to the forms of action.

They could not but feel conscious that, by this course, they of necessity placed themselves in an attitude adverse to the immediate interest as well as to the trained habits and learning of a large number of the profession to which they belong. The character of the profession is in its very nature eminently conservative in all its tendencies; the rules of jurisprudence are all drawn from the past; precedent is the lawyer's guide. The spirit of reform and innovation which characterizes the age, and to which the world is indebted for all the advances of the present century, are seen at a distance by those who administer the law; they may appreciate and enjoy them in their personal and public relation, but in their own profession they still pore over the musty volumes of antiquity in search for *precedent*.

The Commissioners had not the presumption to expect, or the folly to hope, that they could originate and produce at a single effort a system so perfect as not to contain many deficiencies and to demand correction and construction for years. They could lay down principles and adapt them to practical use, but to improve and perfect them, to settle their construc-

tion, is necessarily the work of time and experience. Neither the Commissioners nor any sensible friend of reform ever expected or pretended that in the details of any new system, so comprehensive in its scope, there would not occur both errors and omissions. Rarely, if ever, in the whole history of human progress has a valuable improvement in any branch of science, philosophy, or the arts, come into existence in full perfection. Time and experience are necessary elements in human advancement: mind comes to the aid of mind, and one suggestion leads to another. We have as yet had the benefit of a few months only of trial, to detect the imperfections of so much of our system as was adopted last winter, and took effect on the first day of July last. We now present to the Legislature the result of this limited though severe test, by proposing several amendments and additions intended to correct the errors and supply the deficiencies already manifested in the part heretofore reported.

The Commissioners have individually availed themselves of all suitable opportunities to invite from members of the legal profession, and from the Judges, communications of discoveries of any defects or omissions which might occur in the course of their practice, with a view to their correction. Some valuable suggestions have been received, and their own personal observation and examination have led to others which are embraced in the amendments presented.

Of the soundness of the principles upon which they have endeavored to build up a system of legal procedure, the Commissioners entertain no doubt whatever. That the superstructure they have erected in detail is free from defects, they have no expectation. Amendments and improvements from year to year will be made; some of these will again be found defective. But the code of procedure is by no means peculiar in this respect. Amendments to the common law, and to the statute law, and to the practice in courts, have been the subjects of annual legislative enactment ever since the Government existed; volumes of judiciary constructions are annually issued, and by their means the law is kept continually changing.

After the practice of the courts of law and equity had been established in this State on the English basis, and had

enjoyed the benefit of more than fifty years' construction, to settle its rules and principles, it was still found so loose, uncertain, and defective as to require more than one hundred and fifty new general rules adopted by the late Chancellor, in addition to those which existed in the time of his predecessor. And so often was the past practice found to be inadequate or erroneous, and so fluctuating, that the Legislature required a periodical correction of its errors and defects, by directing the Chancellor to revise and amend the rules of his Courts at stated times. This revision was repeatedly made, and at the periods required by law the old rules became obsolete, and a new volume was issued with such modifications as had been adopted during the last interval, and such changes as the Chancellor deemed expedient.

While such was the variable condition of the practice in chancery, that of the Supreme Court was scarcely more permanent; new laws, new constructions, and new rules, were of constant occurrence.

The special terms of the late Supreme Court, at which questions of practice were for the most part determined, were always held at the Capitol. The consequence was, that but few of the legal practitioners were enabled to attend, and these few enjoyed not only a monopoly of the business, but also of a knowledge of the practice itself, except so far as others were able to follow by means of the meager reports of a small number only of a multitude of cases decided.

Thus it will appear that the history of legal procedure in this State presents a continual series of construction and change by the Courts and by legislative action, notwithstanding the boasted antiquity of its origin.

It can not, therefore, properly excite distrust, or afford the slightest evidence against the value of the new system, that it requires, in the first year of its existence, amendments in various particulars; or that further experience will probably disclose defects hitherto unnoticed.

The necessity of establishing rules of procedure, not wholly dependent upon the judgment and direction of the Courts, has become greatly enhanced by the change in the judiciary system of the State, effected by the new Constitution. By this change

the Courts have become decentralized, and now administer justice with equal jurisdiction in all parts of the State at the same time. The new arrangement is so far unfavorable to the introduction of an entire new system of practice, as it gives rise to various constructions of the same rule by different judges, and the Commissioners regret that this difficulty has been increased by the manner in which the power conferred by the code on the late Executive in regard to the terms of the Court has been exercised; without calling in question the views under which it was done, they can not but regard the arrangement as unfavorable; instead of providing for an interchange among the Judges of different districts at general terms, where they might confer together, and learn and modify each other's views and constructions of the statutes and Constitution, the Judges of each district were required to hold all the general terms in their own districts respectively, thus rendering the judicial districts as distinct as possible. It appears to the Commissioners that the intent and spirit of the Constitution, not less than sound policy, require that the Supreme Court of the State should, as far as possible, be assimilated and become one Court, in fact and in practice, as it is in name.

While it is apparent that the introduction of a new system of practice and pleading is rendered more difficult by the peculiar and diffused organization of our Courts, its necessity and beneficial effects when once established are no less manifest. Indeed, a set of principal regulations, to which all the Courts are alike subject, proceeding from the Legislature and dependent upon the Courts only for construction of language, seems almost an indispensable concomitant of our system of Courts. . . .

The various amendments suggested indicate in most cases their own object; and, though it might have been appropriate and desirable to add notes more fully explaining the reasons which have led to their recommendation, the time within which the report must be made prevents it.

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## THIRD REPORT OF THE PRACTICE COMMISSION,

JANUARY 30, 1849.

*To the Legislature of the State of New York :*

THE Commissioners on Practice and Pleadings beg leave to present herewith their third report.

The draft of an act which is submitted contains various provisions designed to prosecute the reform which the code of procedure began. It should seem scarcely necessary for the Commissioners now to vindicate the policy of that reform. The history of the agitation which gave rise to it, the manifold abuses of the old system of legal procedure, the demands of the people expressed in the Constitution itself, the act of the Legislature passed in conformity with its command, and prescribing the duty of the Commissioners, in language which could not be misunderstood, are familiar to the Legislature. If it were necessary, the Commissioners would recall its attention to the terms of the law under which they were appointed, which enjoined it upon them as a duty to provide for the abolition of the forms of actions and pleadings in cases at common law, for a uniform course of proceeding in all cases, whether of legal or equitable cognizance; and for the abandonment of any form and proceeding not necessary to ascertain or preserve the rights of the parties—a law which had then no parallel on the statute-book for its boldness, and which, while it gave the Commissioners instructions so precise as to leave them no discretion, if they had desired it, promised them therefor in advance, so long as they obeyed those instructions, the concurrence and coöperation of all departments of the government.

Conforming to that law, and fulfilling at the same time their own desires, the Commissioners have removed the ancient forms from the paths of justice, and devised a new system, simple and natural in its construction, easily understood, and readily adapted to any remedy which the nature of the case requires. In doing so they have been obliged to recast the whole system of practice and pleading. It was impossible to adjust the new parts to the old. With a single eye to a uni-



form system of pleading and trial, they have arranged the details so as to accomplish that object, and to lessen the labor and expense of legal proceedings.

That there should be inconvenience resulting from these changes was inevitable. The former practice, with all its incongruities and oppressions, was familiar to the bench and the bar. Much of it consisted of arbitrary forms which a clerk could use. They who had mastered it in youth had forgotten the distaste with which they then regarded it, and had come to consider it as something necessary and unalterable. A sudden and total revolution in their art; a change in all their habitudes of thought and practice; the double need of forgetting the old and learning the new, difficult at best, and next to impossible in a certain class of professional men; the necessity of increased vigilance, and the harder necessity of measuring themselves at a disadvantage with others having less to unlearn and more power to learn—all these causes would necessarily make a new system unpopular with great numbers of the legal profession, and no inconsiderable portion of the judiciary.

That, however, is not an argument against the change; it only proves the greatness of it. If it had been less complete, it would have received less of censure; if it had met with general commendation, that would have proved it valueless by showing that it encountered no prejudices and opposed no interests. That it is a revolution in legal procedure is certain, and it is equally certain that that is precisely what was required of the Commissioners. The wit of man could not devise a scheme of abolishing the distinctions between the forms of actions and between legal and equitable remedies, which are the very roots of the old procedure, without a new growth from the very beginning.

Not only was a change so radical required of the Commissioners, but nothing less would have afforded a remedy for existing abuses. The distinction of actions and of legal and equitable remedies had its origin in a state of society as remote from our modern civilization as the modes of communication in our day are different from those of our ancestors. It was time that the forms of action should pass away, to take their place with the wager of law, trial by battle, compurgation by

witnesses, and the grand assize, which were once as important parts of the English law as the forms of actions. To resist their abolition now, is to maintain either that they are eternal, or that society has not yet reached that stage of civilization where they can be safely dismissed. Neither can be maintained without disparagement to the intelligence of this age.

The law is not in its nature stationary beyond other sciences. It must change with changing manners, the diffusion of wealth, new channels of industry, and more general intelligence. That which was natural in the fifteenth century is uncouth and strange in this. Things which were then convenient are now become intolerable. The knowledge of that day has been multiplied many times. Arts, then in their infancy, have grown to perfection; in other branches of knowledge advances are constantly made, the mind searches for new truths, and the search is encouraged. In respect to law is the rule reversed? Are we there to tread for ever in the ways of the past? Was the fifteenth century more competent to make law for us than the nineteenth? The argument which is founded upon reverence for the past, and the fear of innovation, would carry us back from age to age, till we ascended to a remote antiquity. None could tell where to stop. Should we take the feudal code or the Roman which it supplanted; the laws of the Norman conqueror, or the laws of Alfred? In short, the argument for a legal system, which is founded upon its antiquity or the great names which adorn it, or, indeed, upon anything but its intrinsic merits, and its fitness for the people for which it is framed, leads to an absurdity.

The change which the Constitution contemplated, and the act appointing the Commissioners required, had been long in coming, but was inevitable. The public mind had arrived at that stage when it could not be satisfied with less. Our society had outgrown the solemn forms which, conceived in remote ages, belonged to monarchical institutions. The time chosen was the fittest possible. The new Constitution had prepared the people for a great change; no other period could be more favorable for it. To abandon it, because some present inconveniences result from it, or because obstacles are interposed to its immediate success, does not suit the masculine

vigor of our people. They are neither fickle nor easily deceived, and the attempt to deceive them will recoil upon those who make it.

The Commissioners are not ignorant that their work has many imperfections. None, indeed, are more sensible of it than themselves, for they have felt throughout, that they have taken upon themselves the painful labor, and the no less painful responsibility, of making the first code of procedure ever made in a country holding the common law of England, and of supplanting by a new work of their own creation, that heterogeneous mass styled practice, which has been accumulating for ages, and of accomplishing it in such a manner as to leave no case unprovided for, and no right abridged.

The making of a code of laws is, under the most favorable circumstances, an undertaking of infinite difficulty. The law commissioners, appointed to prepare a penal code for British India, at the head of whom was Macaulay, used language not too strong when, after making the best code of that branch of the law in our language, and in communicating it to the Government, they said: "To the ignorant and inexperienced, the task in which we have been engaged may appear easy and simple. But the members of the Indian Government are doubtless well aware that it is among the most difficult tasks upon which the human mind can be employed; that persons placed in circumstances far more favorable than ours have attempted it with very doubtful success; that the best codes extant, if malignantly criticised, will be found to furnish matter for censure in every page; that the most copious and precise of human languages furnishes but a very imperfect machinery to the legislator; that in a work so extensive and complicated as that on which we have been employed, there will inevitably be, in spite of the most anxious care, some omissions and some inconsistencies; and that we have done as much as could reasonably be expected from us, if we have furnished the Government with that which may, by suggestions from experienced and judicious persons, be improved into a good code."

Mindful of these difficulties and of their own deficiencies, but never doubting the truth of the principles on which their code

is founded, nor the benefits which will finally result from its adoption, the Commissioners have labored to perfect their work to the utmost of their power. Since it became a law they have watched its operation with the most careful attention, anxious to amend every defect, to remove every difficulty, and to adopt every improvement which time and experience might suggest. They have found occasion to propose amendments to forty-seven sections, some of which are merely verbal, and others made necessary by judicial misconstruction.

The few months of trial through which the code has passed have confirmed the Commissioners in their opinion of the beneficial effects which will flow from it. That it will greatly diminish litigation they do not doubt; that it will make justice more certain and more speedy they are confident; and, if finished according to the plan upon which it was begun, it will furnish to the people an intelligible body of law for every branch of legal procedure. . . . The Commissioners have thus laid before the Legislature all that they have been able to prepare within the time fixed by the act under which they were appointed. They have submitted those parts of a general and complete code of procedure which relate to actions, civil and criminal, and to prerogative writs, with some provisions respecting the organization of the Courts. There still remain, as the Legislature will perceive, other parts necessary to be written before the code can be completed. These are, the jurisdiction of the Courts, proceedings in surrogates' courts, the functions and duties of judicial officers, including sheriffs, coroners, referees, and clerks, the discharge of insolvent and imprisoned debtors, the enforcement of liens, and the law of evidence. Before the code can be put into the hands of the people in that completed state in which they have a right to expect it, these parts must be written, and the whole code then arranged in one volume, with a convenient mode of notation and of reference from one part to another. That being done, the Commissioners confidently believe that the people will not be disappointed in their expectation of receiving a real, complete, and lasting reform in legal procedure.

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## FINAL REPORT OF THE PRACTICE COMMISSION,

DECEMBER 31, 1849.

*To the Legislature of the State of New York :*

THE Commissioners on Practice and Pleadings have the honor to submit herewith their complete report of a code of civil procedure.

This code is intended to embody the whole law of the State concerning judicial remedies in civil cases, and to supersede the third part of the Revised Statutes, a portion of the first and second, a large number of subsequent statutes, and all of the common law on the subject of civil remedies.

Having entered upon the duties of their commission with an earnest conviction that the time had arrived when great changes in judicial procedure ought to be made, charged by the Constitution and the statute under which they were appointed with an entire revision of the existing systems, and specially enjoined to make changes which struck at its foundation, it can excite no surprise that the reforms they have proposed are comprehensive and fundamental. In bringing their labors to a conclusion it is their highest hope that the favorable opinions which have encouraged them so far may not be forfeited upon maturer experience.

It was a question with the Commissioners of some embarrassment how far it was wise to go into details. There were two opposite difficulties to be avoided: on one hand, was the danger, by provisions too general, of leaving a wide space for judicial discretion; on the other, equal danger, by going into minute details, of making the practice inflexible and intricate, increasing the risks of mischance, and leaving unprovided for whatever particulars were unforeseen. Whether they have succeeded in finding what they desired—a middle path between a judicial discretion, too wide for safety on the one hand, and too narrow for convenience on the other—can only be known by the result.

It is impossible, within the compass of this communication, to give any other than the most general account of the code,

as it is now presented. It is divided into four parts: The first relates to the courts of justice, their organization and jurisdiction, and the functions and duties of all judicial and ministerial officers connected with them; the second embraces the subject of civil actions, with all their incidents; the third relates to special proceedings; and the fourth to evidence.

The essential features of the original code remain of course unchanged by the present report. Every day's experience adds new testimony to the soundness of its theory, and to the beneficial effects of its reduction to practice. The system which it traced out, and which is now filled up, will, it is hoped and believed, remain the settled policy of the State, for it is founded upon just and immutable principles.

In completing the system and adapting to each other the parts already enacted and those which are now for the first time submitted, changes of minor details were of course necessary; the addition of new provisions affected to some degree the previous ones; and the frequent references to the old law, which the existing code contains, are in the present report generally omitted as unnecessary, because it is proposed that the old shall be superseded. With these exceptions, and a few other changes in details, which experience has shown to be desirable, such as a modification of the reply in pleading, and a reduction of costs in certain cases, the present complete report will be found not to depart, in any essential respect, from that which was enacted as a part of the system.

The purpose of the constitutional provision and of the statute under which this code is prepared, was to make legal proceedings more intelligible, more certain, more speedy, and less expensive. Heretofore the records of the Courts have been sealed books to the mass of the people. Though concerned in them as suitors and participating in them as jurors, they were repulsed by strange forms and technical language. If the law could have been administered with absolute certainty, without delay and without expense, yet if it had been unintelligible to them, it would not have been satisfactory. In a country where the people are sovereign, where they elect all

officers, even the Judges themselves, where education is nearly universal, it was not long possible to keep the practice of the Courts enveloped in mystery.

The Commissioners have never lost sight of these considerations. In aiming at directness and efficiency they have aimed also at diffusing a knowledge of legal proceedings, and there is, they trust, nothing in this code which any person of ordinary intelligence and education can not understand. And although the law of rights is a vast science, the accumulation of numerous countries and ages, which it requires study and patience to comprehend, yet it is believed that the practice of the Courts is here set forth in such a manner that no person need have occasion to witness a legal proceeding, read a pleading, or render a verdict, the meaning of which he does not comprehend.

That the expense of legal proceedings has been greatly diminished by the existing code is generally admitted; it will be diminished still more by the present. / That certainty is promoted by the abolition of needless distinctions, the disuse of technical forms, and a free use of the power of amending errors and defects, and dispatch by frequent courts, and the directness and simplicity of their operations, should seem to be unquestionable.

That there are great delays in some of the districts is too evident; but they arise from the accumulation of business devolved upon the new Courts by the old Supreme Court and Court of Chancery, and also from the habits of business in some of these Courts. If the old cases were now disposed of, the Commissioners are persuaded that, under proper regulations for the dispatch of business, no Court need ever adjourn until it had disposed of all its cases on its calendar. Indeed, it ought to be held as a cardinal rule that, at each session of a Court, every case ready for its action should be acted upon; and if that does not happen, there is a defect somewhere which requires the immediate interposition of the Government.

Under any system from which the trial by jury is inseparable, as it is in ours, there must be some delay. Juries can not be assembled for particular cases as they arise; they must be

drawn periodically, and in large or thinly populated countries at considerable intervals: so much the more reason is there that when the Court does meet, and the jury are called together from different parts of the country, all the business waiting for them should be dispatched.

The Commissioners have inserted in their report, for the purpose of carrying out this principle, a provision requiring the Judges of the Supreme Court in any district, whenever a Court adjourns leaving business undone, to request the Governor to assign other Judges for it, and giving power to him to appoint extraordinary terms and circuits as well as to assign Judges to hold them. It is quite certain that the present delays in certain districts ought not to be longer endured. Should these provisions for any cause fail of securing the end in view after the lapse of a suitable time, the Commissioners recommend that the Legislature appoint a committee to investigate the cause of the delays, particularly in the first district.

Among other provisions of the code will be found a chapter designed to furnish a summary remedy in a certain class of contracts, where the defendant has liquidated the demand and given an unconditional promise to pay it, or where it has been already settled by a judgment in a sister State. Thus upon a bond, promissory note, bill of exchange, or judgment of another State, the plaintiff may give notice with his complaint of application for judgment to a judge out of court at any time not less than forty-eight hours afterward, and, if a sufficient answer be not then made, summary judgment must be given; and, even if an answer be made, the plaintiff on indemnifying the defendant, may have an attachment to secure his debt. So, upon a mortgage, there is provided a summary foreclosure, without action, more comprehensive and safe than the present proceeding by advertisement, and at small expense. Provisions are inserted for the purpose of applying a remedy to the abuses in assessments, so far as can be done by the action of the Courts. There are also chapters for the discharge of insolvents in certain cases, and for a compulsory cession of their property, for the payment of their debts.

By means of the courts of conciliation for which, in accord-



ance with the Constitution, provision has been made, many of the actions now brought for slander, assault, and others of a like kind, may be avoided, and by extending the inducements to a compromise during a litigation, actions commenced may often be settled before a trial. Thus it is to be hoped there will be fewer cases requiring the decision of the Courts, and not more than they can readily dispatch as fast as they are brought before them.

Upon the subject of evidence, the change of the name of the writ of *habeas corpus*, and the organization and functions of the court of conciliation, as reported, one of the Commissioners (Mr. Graham) dissents—a dissent which his colleagues regret, but to which their views of their duty will not permit them to yield.

If the time given to the Commissioners for the completion of their work had permitted it, they would have introduced more detailed provisions for certain proceedings in surrogates' courts, and would also have prepared a book of forms to accompany the code.

The Commissioners are constrained to bespeak beforehand the indulgence of the Legislature and the people, for the errors and imperfections which will doubtless be discovered in their work. When it is considered that the two codes of procedure, civil and criminal, cover the whole ground of remedial law, and are intended to dispense with all previous statute and common law in that department; that they together constitute an entire code of remedies, the complement of the code of rights, and designed in connection with it to unite, as the Constitution contemplates, in "a written and systematic code, the whole body of the law of this State," the magnitude and difficulty of the work, and the need of the amplest indulgence toward its authors, will be admitted.

In laying down, at last, the great trust with which they have been clothed, the Commissioners take this occasion to make their most grateful acknowledgments to the people of the State for that generous confidence and support which could alone have sustained them.

## STATISTICS OF LITIGATION.

*Note to Section 354.*

Section 354 is as follows :

The Attorney-General must prepare and cause to be printed blank tabular forms for the proper returns from the clerks of the several courts, embracing the particulars specified in the last section, and to transmit annually in the first week in July a sufficient number of such blanks for one year's returns to the clerks of the several courts. . . .

The purpose of these provisions is to bring annually before the Legislature and the people the state of the judicial department of the Government. We can hardly urge too strongly the importance of providing the means of obtaining complete and accurate information concerning the operations of that department. The operations of the legislative and executive departments are accessible and well known. But, in the judicial, adequate information is nearly inaccessible. There are, it is true, immense files of papers, the judgment-book, and the judgment-rolls. To collect, from these scattered sources, all that is necessary to make known the working of the system, and the effect of changes, is next to impossible. This information is most desirable. Without it, legislation upon the subject must be made upon a view of a few particulars without a view of the rest. There can be no safe, comprehensive plan, unless the whole subject is presented together. The worst of all legislation is that which makes a general law to suit a particular case ; for it thus commonly happens that while in that particular there is an amendment, the change affects another part for the worse. Without a view of the whole subject, neither the magnitude of an existing evil nor the benefit of an existing provision is seen.

There is no reason for publicity in respect to any branch of the public service that does not apply with increased force to this. No better view of the progress of public morals, in either direction, can be obtained than from the records of the Courts. Nor is there, within the whole circle of influences, preventive or penal, that operate upon the administration of justice, any one more efficacious than that complete publicity which would follow from a periodical collection and

condensation, carefully made, of the proceedings in all the Courts of the State; in short, an annual report of the *statistics of litigation*.

Nowhere in this country, nor in England, have such reports yet been made. But in France annual reports have been published, as to the civil tribunals, since 1826, and, as to the criminal tribunals, since 1831. The work there is thoroughly systematized. The Minister of Justice watches over the operation of all the tribunals from the highest to the lowest; minute reports are made to him of their proceedings; and he annually presents a general report, made up from these, and consisting of a series of statistical tables, showing the number of cases brought in each of the Courts of France, the nature of each case, its duration, the judgment pronounced, whether by default or after litigation, the number of cases settled, the number referred, the number arbitrated, the number settled by the tribunals of conciliation, the number of appeals and their result; the whole preceded by a summary from the Minister, giving the most important conclusions deducible from the tables. . . .

It will be long, we fear, before the people of this State have so complete a body of statistics presented to them respecting their tribunals; but a beginning may now be made, and a system established, which will lead to constant improvement.

The Attorney-General seems to be the proper officer to take charge of such a work. He is a high law officer of the State, and stands in an intimate relation with the whole judicial establishment. From him the people may expect carefully prepared statements, and useful suggestions for the dispatch of business in the various tribunals.

## DUTIES OF ATTORNEYS AND COUNSELORS.

### *Note to Section 511.*

Section 511 is as follows: It is the duty of an attorney and counselor—

1. To support the Constitution and laws of the United States, and of this State;
2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings or defenses, only, as appear to him legal and just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the Judges by any artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets, of his clients;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action or proceeding, from any motive of passion or interest; and,

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

The provisions of this section are taken substantially from the oath prescribed to advocates by the laws of Geneva. That oath is as follows:

I swear before God—

To be faithful to the republic and the canton of Geneva;

Never to depart from the respect due to the tribunals and authorities;

Never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defense of an accused person;

Never to employ knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the Judges by any artifice or false statement of fact or law;

To abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged;

Not to encourage either the commencement or the continuance of a suit from any motive of passion or interest;

Not to reject, for any considerations personal to myself, the cause of the weak, the stranger, or the oppressed.

This appears to us to express so justly the general duties of lawyers, that we can not do better than take almost the very terms of it in prescribing their duties.

The profession of a lawyer is essential to society. Its character and honor are public interests. Not only is the advice of lawyers necessary in the more difficult transactions of private life, but their intervention is necessary to represent the suitor, and advocate his rights before the courts. In this position

everything is confided to their integrity. The magnitude of the interests placed in their hands, property, character, liberty, life, the responsibility which they assume, the confidence which they receive, all demand and presuppose the highest qualities and character. No dishonest or dishonorable man can retain the confidence of honest and honorable men. The most intimate connection, in reality, subsists between the character of the community and the character of the bar. An unscrupulous bar could not exist in a high-minded community; and, if anywhere a corrupt legal profession is to be found, it is found in the midst of a corrupt and corrupting people.

The judicial department is recruited from the legal profession. Judges must be lawyers. This circumstance alone, the mere fact that one of the great departments of government, coördinate in power, equal in dignity, and the one upon which especially the safety of the citizen depends, is, by the law of its condition, eligible only out of the ranks of one profession, is enough to give it a preëminence. The integrity of the judiciary, more than that of any other class of magistrates, is evidence of the soundness of the public mind. The character of the Judges, however, is the character of the lawyers. Made at the bar, their moral characters there take their complexion. To degrade the bar, therefore, leads directly and inevitably to the degradation of the bench.

There are certain grave errors, somewhat current, respecting the duties of lawyers, which deserve serious consideration. We refer particularly to their alleged indifference to the moral aspects of the causes they advocate. Not that there is anything like the indifference which is supposed to exist; on the contrary, persons, more scrupulously careful never to take part with wrong, or seem to do so, can not be found in any profession. But there is, nevertheless, an impression widely diffused, not only in the profession, but out of it, that a lawyer may properly advocate a bad cause. This view of the case we here venture briefly to consider.

When a lawyer is asked for his opinion upon a purely legal question, his duty ends with stating the law as it is. In many instances, however, more than this is asked. His client seeks

his advice respecting his future conduct. In such cases his duty as a moral being requires him to advise justice. His position as a legal adviser does not exempt him from the moral duties which bind other men. He has no more right than another friend to advise what is unjust or oppressive. Undoubtedly the client must judge for himself of the moral quality of his own actions, and, if he desires no more than to know what course the law requires under particular circumstances, the adviser's duty ends with explaining that. But in practice the client generally expects and asks more. He asks advice from a friend who knows what his legal rights are, and who probably has more of his confidence than another person. In such circumstances, he is bound by moral, and should be bound by human, laws to throw his influence upon the side of integrity. To assent to the bad scheme of an unjust client, is to become equally guilty with him, and the two are as much conspirators to effect a wrong as if they had originally concocted a plan of iniquity with the view of sharing in the plunder. And when, in addition to advice, the client wants an advocate, and asks for active coöperation, the same laws bind him just as strongly to refrain from pursuing an unjust object.

It is sometimes said that a lawyer is not at liberty to refuse his services to any person, and that when once engaged he is at liberty to employ every means in his power for his client. Indeed, so eminent a person as Lord Brougham is reported to have said, in a speech in the British House of Lords, that the advocate is bound to forget that there is any other person in the world besides his client, and to lose sight of every other consideration than of success.

Is it possible that this can be just? Should the advocate forget that there is a society, whose welfare he is bound by the highest sanctions to promote; that there are other parties, whose rights are at stake; that there are duties to society, to every member of it, as well as to the one who retained him?

The doctrine appears to us unsound in theory, and most pernicious in practice. It assumes that a man has a right to whatever the law can give him, that the law is so plain that it

can not be mistaken or perverted, and that one may rightfully avail himself of every defect in an adversary's proof which the rules of evidence, or accident, or time, may have created; three propositions, every one of which is without foundation. Suppose that a client makes claim to land, in the possession and apparent ownership of another, whose evidence of title, however, has been destroyed by accident. The advocate knows from confidential communications, made to him as counsel, that his client has not a just claim to the land; but, from defect of proof on the part of the possessor, it is easy for him to recover it. If the client asks it, is he bound to assist him? Few persons will maintain that. But if the doctrine is a sound one, does not this follow? There is, as it strikes us, no middle ground. If the advocate is to overlook the moral aspects of the claim, he must recover this property for his client. Putting so extreme a case tests the principle, and shows it to be unsound, by showing that it leads to a consequence so revolting.

The law, moreover, is not so clear and precise but that it may be mistaken or perverted. A strong mind at the bar, and a weak one on the bench, lead often to erroneous judgments. The argument we oppose, takes for granted the infallibility of judges, and the certainty of law. Who, conversant with the proceedings of courts, does not know that neither can be counted on? Before ordinary tribunals, more depends on the advocate than is generally imagined.

Is it lawful to use the power of reason and eloquence to sustain a bad cause, to support the guilty, or, what is more revolting, to persecute innocence? May the faculties be abused, and learning perverted, to make false reasons seem true, to cover up weak points, to give undue prominence to some facts, to conceal others, to magnify one's own cause, to vilify an adversary's? To hold this proceeds upon the fallacy that truth and right can not be misrepresented or concealed. Who does not know the contrary?

If it be said that it is the duty of an advocate to go no further than to present the cause of his client truly, leaving the results to the courts and juries, it may be answered that truth is absolute, not relative. To present a case truly requires the

whole truth on both sides, as well that which makes against, as that which makes for, a client. If he present the favorable circumstances, and suppress the unfavorable, does he present the case truly? Does he not rather impose a false impression on those who have to judge?

We by no means assert that an advocate may not take upon himself the defense of a man whom he believes to be guilty. He may. The section we propose permits him to do so. If he have derived his belief from the confession of the accused, he should pause in assuming his defense. The law gives to every man charged with crime the benefit of the rule that his innocence is to be presumed by his judges until the prosecution have established his guilt, by proof beyond a reasonable doubt. Of this rule the advocate is the intermediate minister. Notwithstanding his own conjectures, surmises, or even belief as to the guilt of his client, he may not become his judge, but is justified if not bound to enforce its application to the inconclusiveness of the evidence of guilt. He may do this the more readily because even the jury themselves are bound to secure to the accused the benefit of its application. He may also undertake to show the circumstances of his case; to present the palliating circumstances of temptation, or of provocation, or anything else that may affect the moral quality of the action, or determine the degree of punishment. He may also in civil cases present defenses recognized and provided by law, although he may himself disapprove of the principle and policy of the law.

But here the advocate should stop. The law and all its machinery are means, not ends; the purpose of their creation is justice: and he who, in his zeal for the means, forgets the ends, betrays not only an unsound heart but an unsound understanding.



## VERIFICATION OF PLEADINGS.

*Note to Section 652.*

Section 652 is as follows :

Every pleading must be subscribed by the party, or his attorney, and the complaint, answer, and reply, must be verified by the party, his agent or attorney, to the effect that he believes it to be true. . . .

. . . . Ought these solemn allegations of the parties, which are called pleadings, and which set forth the cause of action and defense, to be verified or not? The solution of this question depends upon two others: first, whether a party should be allowed to aver what he does not believe; and, second, whether there be any better test of his belief than his own affidavit. Both questions admit of easy answers.

There are several reasons why a party should not be permitted to aver, in a court of justice, what he does not believe :

*First.* The Courts are, or should be, schools of morals. It becomes them to set virtuous examples. Of all the institutions of society, they should be most sacred to truth. Whenever, therefore, they sanction, connive at, or open the door to untruths, they falsify their own professions, and become the corrupters rather than the teachers of mankind.

*Second.* Men should be protected, as far as possible, against false charges. It is signally unjust that any person should vex another with a claim founded upon statements which he does not believe. Nay, more, it is the highest duty of society to protect every member of it in the enjoyment of his rights. What sort of protection does it afford, if it allows these rights to be assailed by every adventurer, even though he furnishes, not only no security against his misconduct and no proofs of his charge, but no test of his sincerity, not so much even as his affidavit of belief in it?

*Third.* Lawsuits are a disadvantage to society at large. They require a large array of public officers. They require the attendance of citizens, either as jurors or as witnesses, to the detriment of their own affairs. It seems consequently most fit that a check, at least as great as this, should be

interposed to the prosecution of frivolous or fictitious lawsuits.

*Fourth.* If the party be not confined in his pleading to what he believes, no adequate reform in pleading can ever be effected. . . .

If, then, it be clear that no party should be allowed to aver in a court of justice what he does not believe, the remaining inquiry is, whether there be any better test of one's belief than his affidavit. Here there seems no room for question. The oath is the universal test applied to the consciences of witnesses. If it be good for the witnesses, it is equally good for the litigants.

What reason is there that the affidavit should not be required? The multiplication of oaths, says one. Then abolish oaths altogether. Let witnesses be no more sworn. But, so long as you administer the oath to the witness, require it also of the party. Requiring it of him, so far from multiplying oaths, diminishes them. For every oath required of a party, more than two witnesses are dispensed with. Who that is at all conversant with the Courts, but knows that every day in court sees numerous witnesses brought, at great inconvenience to themselves, to swear to facts which the parties would not dare deny, if they were put to their oaths? Can there be a doubt which is better—to harass the witnesses, or to purge the consciences of the parties?

### THE PRINCIPLES OF EVIDENCE.

#### *Note to Part IV, relating to Evidence.*

This, the only remaining part of the code, embraces the subject of evidence. Large and difficult as is the subject, we can not omit it from this work without presenting to the Legislature an incomplete code of procedure. As we interpret the constitutional and statutory provisions under which we act, our commission includes the whole procedure in civil and criminal cases. To omit the subject of evidence would therefore imply either that it did not fall within the scope of a code of procedure, or that it was in its nature incapable of being reduced to a written code.

We have referred to the subject in our communications to both the Legislatures to which we have already reported. In the report of 1848 we took occasion to say :

“The courts of justice and all their officers; the time within which actions must be commenced; the mode of bringing the parties before the Court; their respective allegations; the trial of disputed questions of fact and of law; *the summoning of witnesses, and the manner of their examination, including the question of their competency, and the rules of evidence*; the judgment to be rendered, the execution of the judgment, and appeals, together with the immense mass of special proceedings known to our law; prerogative and remedial writs; arbitrations; the processes against absent and insolvent debtors; and a revision of the practice, pleadings, and proceedings in criminal cases—all appear to be embraced in the comprehensive language of the Constitution. Acting upon this view, it is the design of the Commissioners to prepare a code of procedure which shall comprehend the whole law of the State concerning remedies in the courts of justice.”

This declaration was reiterated at the last session, in our answer to a resolution of the Senate and in our report to the Legislature; and, with these views before them, they continued the commission to the present time.

In accordance, doubtless, with the same view of the subject, the Legislature of Massachusetts at their last session, following the example of New York, passed a resolution for the appointment of three Commissioners “to revise and reform the proceedings in the courts of justice in the Commonwealth, except in criminal cases,” and directed that “the duties of the Commissioners shall embrace the consideration and revision of the mode of bringing the parties before the Court; all their respective allegations; the trial of questions of fact and of law; *the summoning of witnesses; the question, also, who may be witnesses, and who may be compelled to give testimony; the manner of their examination, and the competency of the same*; the judgment to be rendered, its execution, appeals, arbitrations; prerogative and remedial suits; and all processes against absent and insolvent debtors.”

It appears to us that the subject properly belongs to the department of procedure. The great line of division in the law is between the department of rights and the department of remedies, of which the latter has been confided to our com-

mission; the former to a different one. A complete code of procedure must furnish a guide to the suitor for every step he takes from the beginning to the end of his controversy; in short, he ought to find in it the whole law of remedies. How can he do this unless he find the rules which inform him what witnesses he may bring, the method of producing them, and of the examination to which they may be subjected? Can it be said with any propriety that the subject of evidence belongs to the code of rights? Then, is not its appropriate place in the code of remedies? It is so classed by philosophical and legal writers. Bentham's "Rationale of Judicial Evidence," the most profound and original work ever written upon this subject, proceeds upon that classification:

"The system of procedure," says he, "judicial procedure, the system of adjective law, is a means to an end. That end is, or ought to be, the execution of the commands issued, the fulfillment of the predictions delivered, of the engagements taken, by the system of the substantive law: the system composed of all the other branches of the body of law put together.

"The law respecting evidence is one branch of that system of adjective law: it therefore ought to be, and everywhere in some degree is, one part of the means directed and applied to the attainment of that end. In proportion to the steadiness and consistency with which it does act in subservience to that end is its congruity, its propriety, its fitness, the claim it has to be approved of and preserved unchanged."\*

That the law of evidence is not capable of being reduced into a written code can not be admitted for a moment. Our people but yesterday signified in their Constitution their wish for the formation of "a written and systematic code," not only of the statute, but of the common law. It is too late, after the discussions and achievements of the last half century, now to insist that there is any part of the unwritten law which can not be reduced to a written code. Though not written in statutes, it is yet written in books, whether books of reports or elementary writers; it does not depend upon tradition; it is not handed down from memory through successive generations, as if there were no written language; but it is preserved in writing. Whatever has been once written can be written again; wherever scattered, it can be found, gathered, digested, reconciled,

\* Vol. iv, p. 477.

and arranged in one book, consisting of a series of propositions. Such a book is a code.

The codes of other countries have been thus framed. It was not expected, it could not be expected, that they would come forth perfect at first; but time and experience wrought the necessary amendments, and the results are great national works.

One of the most distinguished members of the council of state under Napoleon, and one who bore a part in the revision of the French codes, Count Real, wrote a few years since, to the late eminent reformer, William Sampson, of New York, in these terms:

"Courage; persevere in the support of written reason against precedents and vague traditions. If law had no foundation but precedents, all crimes and injuries would have remained unpunished and unredressed from the creation till this day. The first judgment must have been guided by reason. Has reason lost its power? Precedents have been made by lawyers as articles of faith by divines. But, whatever respect I may entertain for religion, I have not the same reverence for the decisions of judges. I do not believe that the march of the human mind is retrograde. . . .

"Do as we did, but do it better, profiting by our mistakes. Let four or five good heads be united in a commission to frame in silence the project of a code. It is not so difficult a task. It is only to consult together, and to select. Do with your best authors as we did with ours, and principally with Pothier's treatise on 'Obligations,' which we simply converted into articles of our code. This *project* once formed, submit it *disputationibus eorum*, and you come to a result. As long as nothing is written, nothing will be done; but you will gain something the moment you have a written text for the groundwork of your discussions, how imperfect soever it may be at first. Our code was far from being adopted as it was originally proposed in the entire. I doubt whether one hundred articles were preserved in the form in which they were presented. It will require ardent hearts and cool heads and resolved industry for such a work. With these, I think, you will not fail of complete success."

With these views of the relation of evidence to the general subject of procedure, of the importance of at least beginning a code of the common law, and of our obligations, under the law of our appointment, we submit to the Legislature the following portion of our work.

## CODES OF COMMON LAW.

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### CODIFICATION OF THE COMMON LAW.

IN 1852 Mr. Field published a series of "Law Reform Tracts," one of which, No. 3, was entitled "Codification of the Common Law." It contained a report made in 1836, by Judge Story and others, upon the codification of the common law of Massachusetts, followed by an appendix, written by Mr. Field. This appendix, after explaining the two provisions for codification, embraced in the Constitution of New York, contained the following:

These two provisions contemplate the reduction into a code of the whole body of our law, so far as such reduction is possible and expedient; the remedial law by the Commission appointed under the latter provision, and the remaining branches of the law by that appointed under the former.

Both Commissions were filled by the first Legislature after the Constitution was adopted. The Commission on procedure fulfilled its trust, and reported to the Legislature a complete code of remedial law, civil and criminal, which was intended to supersede all previous statute and common law in that department. About one third of the Code of Civil Procedure, thus reported, has been passed into law; the rest of the civil and the whole of the criminal remain untouched by the Legislature. The other Commission failed entirely, and it failed because the men who were appointed to it had no faith in a codification of the common law; and neither appeared to understand what was meant by it, nor were competent to undertake it if they had. They thought only of a new revision of the statutes. We wanted no revision of the statutes. What we wanted was a codification of the common law.

It remains for future Legislatures to see that this unfinished work, the greatest of all tasks, is resumed and completed.

First, the untouched portion of the Code of Procedure ought to be considered and adopted ; and then a competent and faithful commission ought to be instituted, to prepare and report a civil code, or code of private rights and duties, and a penal code, or code of crimes and punishments. The Political Code is already nearly perfect in form, and corresponds generally with the first part of the Revised Statutes. It needs little more than a careful revision.

How can such a commission best be organized ? It seems to us, considering the eagerness of incompetent men to take office for the sake of salary—and, the grosser the incompetence, the greater the eagerness—that if faithful, earnest, and competent persons can be found, willing to undertake the work for its own sake, as a labor of love and duty, without other reward than the satisfaction of acting in a good cause, for a great end, they, and they only, should be appointed. In such case, an act something like the following would be sufficient :

The people of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. A B, C D and E F are hereby appointed Commissioners, whose duty it shall be to reduce into a written and systematic code, the whole body of the law of this State, or so much and such parts thereof as shall seem to them practicable and expedient, excepting always such portions of the law as have been already reported upon by the Commissioners on Practice and Pleadings, or are embraced within the scope of their reports.

SEC. 2. The Commissioners shall divide their work into three portions ; one containing the political code, another the civil code, and a third the penal code. The political code must embrace the laws respecting the government of the State, its civil polity, the functions of its public officers and the political rights and duties of its citizens ; the civil code must embrace the laws of personal rights and relations, of property and of obligations ; the penal code must define all the crimes for which persons can be punished, and the punishment for the same. But no portion of either of said codes shall embrace the courts of justice, the functions or duties of judicial officers, nor any pro-

visions concerning actions or special proceedings, civil or criminal, or the law of evidence.

SEC. 3. The Commissioners shall hold their offices for five years, and any vacancies that may occur during that time may be filled by the Governor. They shall receive no compensation.

SEC. 4. The Commissioners shall report to the Legislature, at its next session, a general analysis of the codes projected by them, and the progress made by them therein, and at each succeeding session the progress made to that time.

SEC. 5. Whenever the Commissioners shall have prepared the codes, or any portion of them, they may cause the same to be printed by the State printer, and distributed among the Judges and other competent persons for examination; after which the Commissioners shall reexamine their work, and consider such suggestions as may have been made to them. They shall then cause the codes, as finally agreed upon by them, to be reprinted and distributed to all the Judges of the Court of Appeals, Supreme Court, Superior Court, and Common Pleas of the city of New York, and to all the county judges, surrogates, and county clerks, six months before being presented to the Legislature.\*

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## FIRST REPORT OF THE CODE COMMISSION,

FEBRUARY 27, 1858.

*To the Legislature of the State of New York:*

THE Commissioners of the Code appointed by the Act of April 6, 1857, beg leave to make this their first report:

Immediately upon their appointment, they entered upon the performance of the duties committed to them, impressed with the magnitude of the undertaking, the difficulty of its accomplishment, and the necessity of caution and deliberation

\* Five years later, that is, in April, 1857, this draft bill was taken up in the Legislature, and passed into law, the blanks being filled with the names of Mr. Field, Mr. Noyes, and Mr. Bradford.



in every step they should take, but with a determination to recoil from no obstacle possible to overcome by their efforts, and to submit to any amount of labor and sacrifice necessary for the preparation of a code of the whole body of the law.

It is known to the Legislature that the duty which the Commissioners are performing is one of the greatest, most difficult, and most responsible.

Nothing within the range of government can exceed in magnitude the task of collecting, condensing, and arranging the jurisprudence of a people. The structure of government and society, and all their complex relations, are comprehended within it. Public order, sound morals, all advancement in the arts of civilization, and all growth in true prosperity, are dependent, in a great degree, upon those rules of action which the State prescribes for the conduct of its citizens.

The difficulty and responsibility in this instance are increased by two considerations: the present state of the law, and the necessity of some modification to make an harmonious system. The condition of our law at the present time is not unlike that of the Roman law in the time of Justinian, or of the French law at the time of Napoleon. From the date of the Twelve Tables to the age of Justinian, the policy and instructions of the Romans had so largely changed, so many new and various laws had been added, and the numerous decisions consequent upon the extension of commerce, the enlargement of the republic and empire, the modifications of social relations, and the conflict of laws of different provinces and nations, had become so complicated, that a code, which is a condensed and reformed digest, was a matter of necessity. Something of the same kind is observable now.

Our law is the product of ten centuries, most of them filled with tumult and disorder; it is compounded of many incongruous elements, Saxon and Norman customs, feudal and Roman law, provincial usages, and the decisions of various disagreeing tribunals. We have equity law, admiralty law, canon law, as the law of marriage and succession, and two kinds of common law, one contradistinguished from statute and the other from equity. Society has undergone an entire transformation. The feudal system has fallen to pieces; monarch-

ical institutions have given place to republican; land, from being almost inalienable, has become an article of daily and hourly traffic; and commerce, once so narrow and timid, embraces the world. Personal rights and personal property have assumed an importance never before known; the numberless questions arising from modern enterprise, travel, emigration, and the expansion of industry and commerce, have developed new departments of jurisprudence; while the multiplication of courts required by the necessities of an increased population, and a traffic constantly augmenting, has produced a mass of adjudications painful for the student to contemplate, and often difficult, if not impossible, to reconcile. Thus we have arrived at the period of which the Roman historian complained so justly, when "the infinite variety of laws and legal opinions had filled so many thousand volumes, which no fortune could purchase and no capacity could digest."

How far, in the preparation of a code, changes should be recommended, is a question of much delicacy. They should, without doubt, be cautiously admitted. Law is the growth of time and circumstance. An original system of jurisprudence, founded upon mere theory, without reference to national characteristics, habits, traditions, and usages, would be a failure. The science of government and law is progressive; new regulations spring from necessity, or are suggested by experience, and the application of the rules of justice to human affairs is constantly modified by the changing circumstances of society. The process is easily understood. In the earlier stages of civilization, when communities are small and isolated, local customs are more distinct, in conformity with local character; but, as civilization and intercourse gradually break down provincial peculiarities and eradicate partial customs, the tendency to assimilation enables the legislator to disregard inconvenient rules, venerable only from age and habit, and gradually to introduce changes which have the experience of other communities to recommend them, and which seem better adapted to an advanced civilization. We thus reach a stage in which valuable improvements may be borrowed from other systems and ingrafted into our own, without impairing the harmony of our laws by the introduction of unsuitable elements. For example,

the law of special or limited partnerships, the offspring of the commerce of the middle ages, unknown to the common law, has within a recent period been adopted into our own legislation, with manifest advantage. So we have also seen the influence of our jurisprudence reflected back upon the country from which we derived our language and our laws; and reforms, readily admitted by our plastic legislation, slowly adopted there, after having been tested by our experience; though the settled Constitution and the fixed habits of England might have prevented their origination in that country.

Thus two great purposes are to be subserved in revising the jurisprudence of a nation: one, the reduction of existing laws into a more accessible form, resolving doubts, removing vexed questions, and abolishing useless distinctions; the other, the introduction of such modifications as are plainly indicated by our own judgment or the experience of others. We are satisfied that this work should be performed with delicacy, caution and discrimination, that nothing should be touched from the mere desire of change, or without great probability of solid advantage.

A code of all the law of a commercial and opulent people can only be made after the most patient study and incessant toil. A superficial observer might, perhaps, suppose a year or two of labor sufficient for it; but he who reflects upon the infinite variety of human affairs, and that the law aims to furnish a rule for every known relation and every foreseen transaction, knows how idle it is to expect it to be hastily, if it be faithfully, performed. The task should seem, indeed, to be hopeless, if it were designed to provide an express rule for every case which can possibly present itself for judicial decision. It is, of course, impossible to foresee all the questions which will arise in the future, or to collect and arrange all those which have arisen and been solved, so as to meet every contingency in human affairs by a definite legal rule. That which in the judgment of the Commissioners can reasonably be attempted is to collect, condense, and arrange those general and comprehensive rules of action, resting upon fundamental principles, recognized by the law or by reason, which will afford, as far as possible, a guide in regard to the rights of person and of prop-

erty. There should be neither a generalization too vague, nor a particularity too minute, in the code of an enlightened and free people, whose intelligence demands that the law should be written, and brought within the knowledge of all, and whose liberty requires that no greater restraints be imposed upon their action than policy and necessity dictate. While, therefore, the Commissioners are duly sensible of the importance of having the work done with all reasonable dispatch, and of the pressing need of some portions of it at the present time, they are also aware of the necessity of proceeding with deliberation, and submitting no portion till it has been carefully considered. Not only must each part be prepared with care, but its relations to the other parts must be examined before it can prudently be admitted.

Acting upon these considerations, the Commissions began by arranging the whole system, and commencing the preparation of each of the codes mentioned in the Act of the Legislature; and, in obedience to that act, they now report a general analysis of the codes projected by them and the progress made by them therein. It will be recollected that, before reporting any portion of the codes to the Legislature, the Commissioners are required, first, to distribute the work among the Judges and others for examination; afterward to reëxamine it, and, upon revision, distribute it anew, and then leave it six months for further examination.

All the laws of a State arrange themselves under one or the other of two general divisions, substantive and remedial laws; or, in other words, the laws which contain the rules of property and conduct, and those which prescribe the mode of enforcing these rules. The latter division has been already brought into the Codes of Civil and Criminal Procedure, which were presented to the Legislature in 1850, by the Commissioners on Practice and Pleadings. The former division is committed to the present Commissioners of the Code.

This division further separates itself into three portions: the first, referring to the government and political relations; the second, to property and private rights and relations; and, the third, to crimes and their punishment; or, in other words, into Political, Civil, and Penal Codes. The Political and Penal

Codes are already far advanced. Of the Civil Code only a small part has been written.

The analysis which is herewith submitted embraces what is contemplated as well as what is completed.

When the codification is finished, there will remain no portion of the Revised Statutes not included in it, or in the special laws mentioned in the analysis. Thus the whole of the fourth part of the Revised Statutes will be embraced in the Penal Code and Code of Criminal Procedure. The whole of the third part of the Revised Statutes is already included in the reported complete Code of Civil Procedure. The Civil Code will embrace, of course, all that is in the second part of the Revised Statutes and some that is in the first, while the Political Code will include all that remains of the first, not already taken into the Civil Code, except that there are certain special laws which are long, full of details, and liable to constant change, and which ought to be separately printed and distributed; as, for example, the poor laws, the health laws, and the militia laws. Leaving these laws out of the Political Code, that, as well as the Civil and Penal Codes, will be of size convenient for common use.

The Commissioners expect to lay the Political and Penal Codes before the next Legislature.

When the outline sketched in this analysis shall have been filled up, the Commissioners hope that there will be presented to the people of this State, in a condensed and convenient form, the great body of their laws—not the laws of England, nor the laws of France, nor yet the laws of Rome, but the laws of the foremost American Commonwealth, formed out of those which were brought in by our ancestors, and those which have sprung from the genius and the wants of our own land.

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## SECOND REPORT OF THE CODE COMMISSION,

MARCH 31, 1859.

*To the Legislature of the State of New York:*

THE Commissioners of the Code, appointed by the Act of April 6, 1857, beg leave to make this their second report:

At the last session of the Legislature, the Commissioners reported a general analysis of the codes projected by them, and the progress made therein to that time. Since that period the draft of the Political Code has been completed and distributed as required, among the Judges and others, for examination. Copies are in the hands of the presiding officers and the judiciary Committees of the two Houses. The time fixed for the receipt of such suggestions as may be made is the 1st of May next.

The draft now made comprises all the subjects mentioned in the analysis as falling within the Political Code. It is divided into four parts: the first of which declares what persons compose the people of the State, and what are the political rights and duties of all the persons subject to its jurisdiction; the second relates to the territory of the State and its civil divisions; the third, to the general government of the State, the functions of its public officers, its public ways, its general police and civil polity; and the fourth, to the local government of counties, cities, towns and villages.

These topics embrace not merely the rights and duties of the citizen, but of the State, and the machinery of government in all its departments. They include the classification, manner of election or appointment, the tenure of office, compensation, powers, duties, and privileges of all public officers; the definition, classification, title, and use of all public ways; the regulations for the internal economy and police of the State, and the system of weights, measures, money, the computation of time, licenses, inns, sepulture, and the observance of Sunday; and also general laws for the government of counties, cities, towns and villages.

It has been the purpose of the Commissioners to bring to-

gether and arrange methodically all the laws of the State, written and unwritten, upon these various subjects. The first part of the Revised Statutes and the subsequent acts of the Legislature upon the same matters are included, excepting the health laws, the school laws, the militia laws, the election laws, the poor laws, and the fiscal laws, which are treated as separate acts. Although some of these acts have been revised and re-enacted, the Commissioners propose to make various suggestions in regard to them hereafter. In the present draft very considerable condensation has been made. Upward of two thousand sections have been reduced into 1,290, and the average length of each section has been diminished. It would be hardly too much to say that there has been a reduction into one half of the space covered by the statutes in their present form. There are, besides, many provisions inserted not now existing in any statute, but taken from the common law.

In the reëxamination which the Commissioners are to make after receiving the suggestions of the Judges and others, they hope to present all these provisions in a form still more concise. It was thought best not to complete the work of reduction and condensation until the collection and arrangement now presented had been made, and submitted to others for examination.

Circumstances beyond control have prevented the submission at this time of the draft of a Penal Code. This, however, it is believed, will not be delayed beyond the next session of the Legislature. In executing it the Commissioners will endeavor not only to define all the crimes known to our law, but to satisfy, in some measure, the general wish for such a readjustment of punishments to crimes as will tend to lessen the discretion of the Judge and promote certainty of conviction. Toward the completion of that, and of the entire work in which the Commissioners are engaged, they promise their best exertions, being anxious to expedite their labor, with due regard to its wise and judicious execution.

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## FINAL REPORT OF THE CODE COMMISSION,

FEBRUARY 12, 1865.

*To the Legislature of the State of New York :*

THE Commissioners of the Code, appointed by the Act of April 6, 1857, having completed their labors, beg leave to make this their ninth and final report :

They have already reported, from time to time, the various steps taken by them in the progress of their work. Their duty, it will be remembered, as expressed in the act by which they were appointed, was "to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as shall seem to them practicable and expedient, excepting always such portions of the law as have been already reported upon by the Commissioners of Practice and Pleadings, or are embraced within the scope of their reports." This work was to be divided into three portions ; one containing the Political Code, another the Civil Code, and a third the Penal Code.

The Codes of Civil and Criminal Procedure, as reported complete by the Commissioners on Practice and Pleadings, were designed to embrace all the law of this State, respecting remedies in the judicial tribunals, civil and criminal, including the law of evidence. There then remained the vast body of substantive law ; that is to say, the law of civil rights and obligations affecting all the transactions of men with each other in their private relations, the law of crimes and punishments, and the law of government, including every branch of administrative and political action. This body of substantive law, the Legislature, by the Act of 1857, declared should be contained in the three codes—Political, Civil, and Penal—and to them the Commissioners of the Code have ever since devoted themselves.

Their first act was to prepare and report to the Legislature a general analysis of the codes projected by them. After this their efforts were next directed to the preparation of the Political Code. This was divided into four parts : The first de-



clared what persons composed the people of the State, and the political rights and duties of all persons subject to its jurisdiction; the second defined the territory of the State and its civil divisions; the third related to the general government of the State, the functions of its public officers, its general police, and civil polity; and the fourth related to the local government of counties, cities, towns, and villages. The draft having been made, was distributed among the Judges and other competent persons for examination; and after that the Commissioners re-examined their work and considered such suggestions as had been made to them; and the whole, as finally agreed upon by them, was reprinted and distributed to the Judges and other officers before being presented to the Legislature. The Political Code, thus drawn and revised, was presented to the Legislature on the 10th of April, 1860.

A few days afterward, by an act passed on the 16th of April, 1860, they were requested to prepare a Book of Forms adapted to the Code of Civil Procedure. This duty was performed by them, and the required forms were submitted to the Legislature on the 30th of March, 1861.

On the 5th of April, 1862, the Commissioners having prepared the draft of the Civil Code, distributed it to the Judges and others for examination, and, on the 2d of April, 1864, they in like manner distributed the draft of the Penal Code.

Having re-examined these two codes, and considered such suggestions as had been made, they have finally revised and agreed upon them.

The Penal Code is herewith laid upon the tables of the members of the Senate and Assembly. The Civil Code is in the hands of the printer, and will shortly be completed, and in like manner furnished to the members of the two Houses. But, as the term of office of the Commissioners will expire before the close of the present session of the Legislature, it is not possible to make the required distribution among the Judges, surrogates, and county clerks, in time for the more formal presentation of the Civil and Penal Codes to the Legislature for adoption.

The Penal Code, thus prepared, defines all the crimes for which, according to the law of this State, persons can be

punished, and the punishment for the same. In preparing it, the Commissioners kept the following objects in view : first, to bring within the compass of a single volume the whole body of the law of crimes and punishments ; second, to supply deficiencies and correct errors in the present definitions of crimes ; third, to make the relative degrees of punishment more nearly equal to the relative degrees of crime ; and, fourth, to define and punish acts deserving of punishment, but not punishable by the existing law.

The Civil Code was required to embrace the laws of personal rights and relations, of property and of obligations.

It has four general divisions ; the first relating to persons, the second to property, the third to obligations, and the fourth containing general provisions relating to these different subjects. In the execution of this vast undertaking, the Commissioners have endeavored to bring together and arrange in order all the general rules known to our law upon the subjects contained within the scope of such a code, rejecting those which are obsolete or unsuitable to our present condition, and adding such others as appeared necessary or desirable.

The first division, it will be seen, defines the civil condition of different persons in the State, adults, minors, persons of unsound mind, and Indians ; enumerates their personal rights ; declares their personal relations, under the various topics of marriage, divorce, husband, wife, parent, child, guardian, ward, master, and servant.

The second division contains the laws respecting property, real and personal, the various interests or estates therein, the modes of acquisition by occupancy, accession, transfer, will, or succession ; the restrictions on alienation and accumulation, the conditions and qualifications of ownership ; uses and powers ; the making, interpretation, and execution of wills, and various special provisions relating to corporations, copyright, shipping, and the rules of navigation. The third division embraces the whole subject of obligations, whether arising from contract or the operation of law, their definition, interpretation, transfer, and extinction, whether by performance, offer of performance, prevention of performance, or otherwise ; the object and consideration of contracts, the parties thereto and their consent,

whether freely given or obtained by duress, menace, fraud, undue influence, or mistake ; and, after these general subjects, the particular subjects are considered of sale, exchange, deposit, loan, hiring, employment, service, carriage, trust, agency, partnership, insurance, indemnity, suretyship, pledge, mortgage, lien, and commercial paper. The fourth division specifies the different kinds of relief afforded for the violation of private rights, and the means of securing their observance, whether compensatory, specific, or preventive, and the measure of damages when compensation is the rule. This division contains, also, provisions concerning the special relations of debtor and creditor, and concerning nuisances, and enumerates and explains various maxims of jurisprudence.

In all this immense range of subjects, while it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the Constitution to "specify such alterations and amendments therein as they shall deem proper." In obedience to this command of the organic law, they have specified various alterations and amendments which they consider proper to be adopted. These are mentioned in the notes to the different sections, where the reasons for recommending them are generally given.

For all these the Commissioners beg leave to refer to the notes themselves. To detail them here would swell this report to an inconvenient length, and therefore three only will be mentioned. In the first division the Commissioners have endeavored to secure the equal rights of married women in respect to their children and their property, abolishing at the same time both dower and courtesy, and they have introduced an article on adoption, by which they have provided that the substituted parent may have all the rights and be subject to all the responsibilities of the real one, who, having once voluntarily renounced his parental rights, should not be permitted to resume them when the affections have grown into the new relation. In the second division the Commissioners have aimed at an assimilation to the utmost extent possible of the laws of real and personal property, by reducing the law of real estate to the simplicity of personal, wherever it could be done with-

out the disturbance of existing rights, establishing for both the same rules of succession.

The Commissioners will not presume to think that in the preparation of the codes they have foreseen all the cases which can arise in the multifarious affairs of men, or that they have even collected all the general rules which have been announced from the bench in the history of our law. Some may have been overlooked, some may have been omitted from a mistaken belief that they were obsolete or inapplicable to our present condition, or were contrary to other rules of greater importance that ought to be retained.

All that the Commissioners profess is, that they have endeavored to collect those general rules known to our law which are applicable to our present circumstances, and ought to be continued. They trust that they have arranged these rules in a manner which will be approved by the scientific student, while it will help the lawyer and the citizen to an easier if not a better knowledge of the law. And they flatter themselves that, for the unforeseen cases which are certain to arise, there are general principles, rules of interpretation, and analogies, which will serve as guides for judicial decision.

The question whether a code is desirable is simply a question between written and unwritten law.

That this was ever debatable is one of the most remarkable facts in the history of jurisprudence. If the law is a thing to be obeyed, it is a thing to be known; and, if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. If a written constitution is desirable, so are written laws. The same reasons which affect the one affect also the other. There may be countries where the conflicts between the different orders in a state render a written definition of their relative rights a difficult or an impossible task, and there, of course, a written constitution is not likely to be attempted; and, because a written constitution is not thought desirable, written laws are supposed to be undesirable. These reasons have no application to this country. We have no orders in the State; no classes of society clashing with each other. The will of the people is the supreme law; that will is fitly expressed by their written Con-

stitution and their written laws. It should seem, indeed, to have no other fit expression.

There are those who argue that an unwritten law is more favorable to liberty than a written one. The contrary should seem to be more consonant with reason. It can scarcely be thought favorable to the liberty of the citizen that he should be governed by laws of which he is ignorant, and it can as little be thought that his knowledge of the laws is promoted by their being kept from print or from authentic statement in a written form.

Whatever is known to the Judge or to the lawyer can be written, and whatever has been written in the treatises of lawyers or the opinions of Judges can be written in a systematic code.

It is no answer to say that nothing can be written which will not be susceptible of different interpretations. That may be true. But it is no more susceptible of different interpretations when written in a code than when written in the reports. On the contrary, when expressed with care, for the very purpose of stating a rule which is to govern all cases alike, there is more likelihood of precision in language than when expressed with reference to a particular case.

For these eight years the Commissioners have been engaged in the preparation of the codes with which they were charged by the Legislature of 1857. The task which they undertook was untried and difficult. No code of the common law of America or of England had ever before been attempted. How they have acquitted themselves it is not for them to say. Their work is before the Legislature and the people. If it shall effect half the good which the Commissioners have ventured to hope from it, and the thought of which has cheered them through their long task, they will be rewarded.

The codes which the Commissioners have thus prepared, together with the Codes of Civil and Criminal Procedure heretofore submitted by the Commissioners on Practice and Pleadings, complete that work of codification which was contemplated by the Constitution of 1846; and, when the same shall have been considered and sanctioned by the Legislature, the people of New York will have the whole body of their laws in a writ-

ten and systematic form, as full, at least, the Commissioners venture to think, as the code of any other people.

In the last months of their service, when their task was well-nigh ended, and while the sheets of the Civil Code were passing through the press, one of the members of the Commission was taken away by death. On the 25th of December, 1864, after an illness of two days, Mr. Noyes died, to the inexpressible grief of his associates; having been suddenly struck down in the fullness of life, leaving to the surviving Commissioners the mournful duty of signing their names, without his, to this last report of their common labors.

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## INTRODUCTION TO THE COMPLETED CIVIL CODE.

THE history of the Civil Code mentioned in the preceding report is as follows: The Constitution of the State of New York, as revised and adopted in 1846, has two provisions looking to a codification of the laws. One is in the seventeenth section of the first article, in these words:

"The Legislature, at its first session after the adoption of this Constitution, shall appoint three Commissioners whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as to the said Commissioners shall seem practicable and expedient; and the said Commissioners shall specify such alterations and amendments therein as they shall deem proper, and they shall at all times make reports of their proceedings to the Legislature when called upon to do so; and the Legislature shall pass laws regulating the tenure of office, the filling of vacancies therein, and the compensation of said Commissioners, and shall also provide for the publication of the said code, prior to its being presented to the Legislature for adoption."

The other is the twenty-fourth section of the sixth article:

"The Legislature, at its first session after the adoption of this Constitution, shall provide for the appointment of three Commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State, and

to report thereon to the Legislature, subject to their adoption and modification from time to time."

Both Commissions were filled by an act passed on the 8th of April, 1847: that under the first article by the appointment of Reuben H. Walworth, Alvah Worden, and John A. Collier, as "Commissioners of the Code," to hold office for two years; and that under the sixth article, by the appointment of Arphaxed Loomis, Nicholas Hill, Jr., and David Graham, as "Commissioners on Practice and Pleadings," to hold office till the 1st of February, 1849. Changes, however, were afterward made in both Commissions.

In the *Practice Commission*, Mr. Hill having resigned, David Dudley Field was, on the 29th of September, 1847, appointed in his place. The Commission thus reorganized was, by an act passed on the 31st of January, 1849, continued till April, and in April was further continued till the 31st of December of that year. On that day it completed its labors, submitting to the Legislature as complete two codes, one of criminal and the other of civil procedure, including the law of evidence. These Commissioners had previously made four partial reports: the first, on the 29th of February, 1848, containing the Code of Civil Procedure as subsequently enacted, and embracing the substance of the reforms proposed in the practice of the Courts in civil cases; the second, on the 29th of January, 1849, containing additions and amendments to the Code as enacted; the third, on the 30th of January, 1849, containing still further provisions; and the fourth, on the same day, containing the draft of a Code of Criminal Procedure. When the completed codes of Civil and Criminal Procedure were submitted, the Commissioners reported, at the same time, a special act enumerating and repealing the various statutes covered by those reports.

In the *Code Commission*, Mr. Walworth having declined the appointment, Anthony L. Robertson was, on the 13th of May, 1847, named in his stead. In January, 1848, Mr. Collier resigned, and Seth C. Hawley succeeded him. In April, 1849, a new act was passed, appointing Mr. Worden and Mr. Hawley, with John C. Spencer, Commissioners of the Code, till the 8th of April, 1851. Mr. Spencer declined to serve on this

Commission, and the Commission itself was abolished by an act passed on the 10th of April, 1850. The Commission, however, was revived in 1857, by an act passed on the 6th of April of that year, by which Mr. Field, William Curtis Noyes, and Alexander W. Bradford were appointed Commissioners, to continue in office five years, and to prepare codes of all the law not considered by the Practice Commission. In April, 1862, the term of office of these Commissioners was extended to April, 1865.

The labor of this Commission is sufficiently detailed in the report prefixed to this volume. The works, in their completed forms, of both Commissions—that is, of the Practice Commission as it was reorganized in October, 1847, and of the Code Commission as it was reorganized in April, 1857—are now comprised in six volumes, containing the Code of Civil Procedure (including the Law of Evidence), the Book of Forms, the Code of Criminal Procedure, the Political Code, the Penal Code, and the Civil Code.

Whether the task which these two Commissions had before them was impossible or useless; in other words, whether it was possible, and, if possible, expedient to reduce into a code “the whole body of the law,” had been much debated, both in this country and in England. One view of the subject has been given in the preceding report. Others may be given here. The question, as was there said, is between written and unwritten law; that is to say, between law written by the law-giver, and law not thus written; between law promulgated by that department of the government which alone has the prerogative of making and promulgating the laws, and law not so promulgated.

Whether a general code of the law be *possible*, should seem, from the nature of the subject, hardly to be doubtful. The common law of New York, like the common law of England, from which it is in great part derived, consists of a vast number of rules of property and of conduct, which have been applied by the judicial tribunals, and which had their origin either in legislative enactments, now forgotten, or in traditions from ancient times, or in the consciences of the Judges, as the cases came before them. The decisions of the tribunals have



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been for ages preserved in writing. If there was ever a time when they were held in the memory alone, that time has long passed. All that we now know of the law, we know from written records. To make a code of the known law is therefore but to make a complete, analytical, and authoritative compilation from these records. The records of the common law are in the reports of the decisions of the tribunals; the records of the statute law are in the volumes of legislative acts. That these records are susceptible of collation, analysis, and arrangement, might have been assumed beforehand, even if we had not the proof in our libraries, in digest upon digest, more or less perfect, to which we daily resort for convenience and instruction. The more perfect a digest becomes, the more nearly it approaches the Code contemplated by the Constitution. In other words, a complete digest of our existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, molded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature, is the Code which the organic law commanded to be made for the people of this State. That this was possible, was all but proved by what had been already done among ourselves.

It was fully proved by what had been done in respect to the law of other countries. The law of Rome in the time of Justinian was, to say the least, as difficult of reduction into a code as is our own law at the present day. Yet it was thus reduced, though, no doubt, to the disgust and dismay of many a lawyer of that period. The concurring judgment of thirteen centuries since has, however, pronounced the Code of Justinian one of the noblest benefactions to the human race, as it was one of the greatest achievements of human genius.

France, at the beginning of her Revolution, was governed partly by Roman and partly by customary law. The French codes made one uniform system for the whole country, supplanting the former laws, and forming a model by which half of Europe has since fashioned its legislation. It should seem, therefore, to be quite beyond dispute that a general code of the law is *possible*.

Whether it is also *expedient* is a different question. One

of the objections made is, that it is not possible to provide for all future cases. You may, it is said, stretch your foresight to its utmost limit; you may exhaust all the sagacity and ingenuity of the human mind; the future, nevertheless, is a sealed book; you can not look into its unopened leaves; and, therefore, attempting to provide for what they contain, is spending your strength in a vain and fruitless effort. This does not appear to be an objection of any weight whatever. Because we can not provide for all cases, should be thought a poor reason for not providing for as many as possible. To render the existing law as accessible and as intelligible as we can, is a rational object, though we can not foresee what ought to be the law in cases yet unknown. To cast aside known rules which are obsolete, to correct those which are burdensome, or unsuitable to present circumstances, to reject anomalous or ill-considered cases, to bring the different branches into a more perfect order and agreement, may be of immense value, though we can not look beyond the present, to make provision for what has never yet appeared.

The objection, however, assumes more than should be granted without qualification. There are certain departments of the law, of which we may affirm with perfect confidence, either that we have provided for every possible case, or that, when a new case arises, it is better that it should be provided for by new legislation, than by judicial decision. Thus, in respect to the Penal Code, it may be affirmed that every act for which punishment may be inflicted ought to be designated beforehand; that no man ought to be punished for an act not thus designated, and that if any act should be committed, for which society has prescribed no punishment, it may go for once unpunished, and a new law be made against other like acts in the future. As to the Political Code, it must by its very nature cover the whole subject. And for the Code of Civil Procedure, it is enough to say that, when the first report was before the Legislature, some of the members were troubled with similar fears about the want of provision for future cases, and, to satisfy them, this provision was introduced: "If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a

wrong, can not be had under this act, the practice heretofore in use may be adopted so far as may be necessary, to prevent a failure of justice"; but no such case has ever yet arisen.

If a case unprovided for could not arise under the Code of Civil Procedure, much less could it arise under the Code of Criminal Procedure. It may, therefore, be safely affirmed that there is but one of the five Codes, that is to say, the Civil Code, to which, with any semblance of justice, it may be made an objection that it can not provide for all future cases. This Code is, undoubtedly, the most important and difficult of all; and of this it is true that it can not provide for all possible cases which the future may disclose. It does not profess to provide for them. All that it professes is, to give the general rules upon the subjects to which it relates, which are now known and recognized, so far as they ought to be retained, with such amendments as seemed best to be made, and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the Code, it is to be hoped that analogies may nevertheless be discovered which will enable the Courts to decide. If, in any such case, an analogy can not be found, nor any rule which has been overlooked and omitted, then the Courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield, in *King vs. Hay*,\* trusting to future legislation for future cases.

The language of the Code in this respect should seem to be sufficiently guarded, thus :

SECTION 2. Law is a rule of property and of conduct, prescribed by the sovereign power of the State.

Sec. 3. The will of the sovereign power is expressed :

1. By the Constitution, which is the organic act of the people;
2. By statutes, which are the acts of the Legislature, or by the ordinances of other and subordinate legislative bodies;
3. By the judgments of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.

Sec. 4. The common law is divided into—

1. Public law, or the law of nations;
2. Domestic or municipal law.

\* 1 W. Bl., 640.

SMO. 5. The evidence of the common law is found in the decisions of the tribunals.

SMO. 6. In this State there is no common law, in any case, where the law is declared by the five codes. [ ] [ ] [ ] [ ] [ ]

SMO. 2032. The rule that statutes in derogation of the common law are to be strictly construed, has no application to this Code.

SMO. 2033. All statutes, laws, and rules heretofore in force in this State, inconsistent with the provisions of this Code, are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this Code provided.

Therefore, if there be an existing rule of law omitted from this Code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists; while, if any new rule, now for the first time introduced, should not answer the good ends for which it is intended, which can be known only from experience, it can be amended or abrogated by the same lawgiving department which made it; and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code and therefore still existing, or by the dictates of natural justice,

Another objection to the expediency of a code is its supposed uncertainty. The argument is this: In the attempt to be systematic and concise, you must of necessity leave the language open to different interpretations. Now, it is quite true that, as a word has often various meanings and a change in the structure of a sentence may suggest different ideas, it is difficult to frame a section that may not be tortured into a meaning unlike that which its framers attached to it. But it is a great mistake to consider this true only of the concise propositions of a code. Diffuseness is not a helper to clearness. The longest judicial opinions are generally the least precise and the least comprehended. As a long document is usually more obscure than a short one; as a statute of many sections is commonly less understood than one of a few; as many words tend to confusion rather than enlightenment; so a single proposition, carefully expressed and made as concise as possible, is more likely to be precise and susceptible of one meaning only, than if the

same idea were put into a different form and a greater number of words.

If it be urged that reported decisions have this advantage in point of certainty, that, being made in each case with reference to a given state of facts, those facts are illustrations of the rule announced, and tend to explain it, the answer is, that the facts of a case reported serve for limitation as well as illustration, and just in that proportion the rule announced is partial and not general, and if acted upon as general tends to mislead; so that, after all, we are brought back to the same point, which is, that the rule of the decision, whatever it may be, partial or general, can be more precisely and accurately stated in a few short sentences than in the opinion more or less diffuse in which it is stated or from which it may be evolved.

So far as reported cases serve for illustration, the present Code makes use of them; for the references to adjudged cases, which in most instances follow the sections, are intended as much to answer the purpose of illustration as to justify the text. It is a favorite idea with many that, for promoting certainty, the propositions of a code should be accompanied by illustrative examples. Whatever advantage there may be in this method, these references, it is supposed, will afford the best kind of illustration.

A still further objection to the expediency of a code is its supposed inflexibility. Expressed in formal propositions, and couched in positive terms, it is not as flexible, say the objectors, as the common law. This is the objection most insisted upon by those who oppose a code, and it should, therefore, receive the most careful consideration. It may be first observed, that flexibility, in its ordinary sense, is one of the worst qualities which a law can have, or rather that it is inconsistent with the idea of law. As the law is a rule of property and of conduct, it should be fixed. If it be meant that a rule, made for a certain state of facts, may not be applicable to a different state of facts, that will not be disputed; if it be meant that such a rule ought not to be applied to the same state of facts under all circumstances, the objection amounts only to this, that the rule is too broadly stated; if it be meant

that a rule ought to be subject to the discretion of the Judges, the proposition is unsound, for the Judges should not have dispensing power.

Another way of stating the objection is to say that, while the common law is expansive, a code does not expand or adapt itself to the expanding exigencies of society. A different phrase for the same idea is, that the common law is elastic and accommodating, and that a code will be the opposite. Now, to say that a law is expansive, elastic, or accommodating, is as much as to say that it is no law at all. The real significance of the objection, if it has any significance, is, that it is better to let the Judges make the law as they go along, than to have the lawgiver make it beforehand. For, if the Judges are to decide according to known rules, those rules can be written by the lawgiver as easily as they can be spoken from the Bench, or taken down by the reporters. And even though, in particular cases, the Judges should fail to find such rules, and should have to make rules as the cases occur, that, too, can be done as easily when the known rules are placed in a code, as when they repose in the breasts of Judges, or in the leaves of reports. So long as a code is confined to the rules of law as they now exist, it is neither more nor less expansive than the common law. When the inquiry concerns new cases, it is divisible into two parts, one relating to those cases which are foreseen, and the other to those which are not foreseen. Those which are foreseen the lawgiver can provide for, and it is his duty to provide for them. Those which are not foreseen can not be provided for, except by directing the Courts to decide according to the analogy of existing rules, when there is such an analogy, and, when there is none, then to decide according to the dictates of natural justice. In this last respect, the Judges will be in the same predicament under a code as under the common law; so that, really, the only point of difference respects those new cases which can be foreseen or reasonably anticipated, and if there be persons who think that, for such cases, it is better that the Judges should make the law, after the cases arise, than for the Legislature to make it as a guide beforehand, then they think that government ought not to be divided, according to the fundamental American

maxim, into three separate legislative, executive, and judicial departments.

If we look, for example, at any of the leading cases reported, we see the facts given, the conclusion of the Judges, and the reasoning by which the conclusion was reached. Whatever legal proposition is necessarily involved in this conclusion is to be deemed an established rule of law. This rule may be written in a code, or it may be left in the reports. Is it any more flexible in the one form than in the other? Certainly not, unless the Judges feel themselves at liberty to depart from it, so long as it remains in the reports alone. But that would be to declare that the decision is not law.

It is possible that the idea of flexibility in one form, and inflexibility in the other, has arisen from not sufficiently attending to the distinction between general and partial rules. It may be perfectly safe to lay down a certain general rule, but not at all safe to undertake the enumeration of all the particulars to which the rule may be applied. A code which should attempt to do the latter would fail, not because it would be inflexible, but because it would be defective. Take, for example, the rule that implies a promise to pay over money which the party ought not to retain, as announced by Lord Mansfield, in *Moses vs. McFarlane*,\* in this language: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money*." This, as a general rule, could be introduced into a code with perfect safety, while it would be certain and inflexible. But if there should be an effort to go into details, and to enumerate all the particular cases to which the rule has been or could be applied, the enumeration would be defective, inasmuch as it would be impossible for human foresight to discern all the occurrences to which it might be applicable. It might be possible to collect and enumerate all the instances in which the rule has been applied, and to state the circumstances; it might also be possible to mention many cases likely to arise in the future to which it would also be applicable; but it would never be safe to pro-

\* 2 Burr., 1005.

nounce absolutely that it should only be applied to the cases enumerated, for the obvious reason that others may occur, just as urgent, which human foresight has failed to discover. The objection to a code which should attempt this would be, not that the rules given were inflexible, or that the code itself was inflexible, in any other sense than that it attempted too much, and was fashioned upon a false principle.

Even in the case supposed, a code and the common law would stand upon the same footing, unless something was put into the former which was not in the latter; for neither in one form nor the other are either the general or the particular rules flexible: the general rule is comprehensive, the particular rules are not comprehensive; the latter would be of little value except as pointing to the former, and if that is once given it covers as many cases when inserted in a code as when left in the common law at large.

There is, for instance, a rule of the common law, that a contract is void which is against public policy. What is or is not against it is left for the Courts to decide, since the policy changes from generation to generation, and almost from year to year. The Judges are not thereby invested with power to change the law, but to apply established law to the circumstances of each case as it arises, and is then compared with the policy of the State for the time being, or with the general policy of nations. The power to decide the question of compatibility in such a case, between the act and the policy, is not a legislative but a judicial power, as much as to decide whether a by-law of a corporation is or is not reasonable, or whether, in considering the effect of an act performed, the time of performance was reasonable or unreasonable. It may, indeed, be affirmed that certain acts are against public policy, and so far the present Code has attempted to go, but it has not attempted, and could not safely attempt, to define all the acts by which men might hereafter seek to countervail that policy, or to foresee what the policy itself should be in ages to come.

If by flexibility be meant susceptibility of progression, then it may be affirmed with confidence, that a code, upon the theory on which this is framed, not only adapts itself to the present wants of society better than the existing common law, but



that it contains within itself, in a greater degree, the elements of future progress; not because its rules are any more or less flexible than those of the common law, but for the reasons which will now be stated.

The first of these reasons is, that while the judicial department has been unable, or, if able, unwilling, to make necessary amendments of the law, the legislative department, to which the power of amendment of right belongs, has been embarrassed; first, by the disjointed and comparatively inaccessible form in which the great body of the law has lain, and, secondly, by that maxim of the common law by which the Judges were taught that every statute in derogation of it was to be strictly construed. The first cause of embarrassment is removed so soon as the Legislature and the people have before them the whole body of the laws in an accessible and compact form, by which the relation of the several parts to each other and to the whole can be better seen, a defect in any part sooner discovered, and the particular amendment indicated which ought to be made. The second cause is removed by the declaration that the maxim of strict construction has no application to a general code.

Nothing is more conspicuous in the history of jurisprudence than the tenacity with which the Judges of America and England, unlike those of Continental Europe, have adhered to precedents, even though the reason for them has ceased, and their mischiefs have become palpable.

Take, for example, the practice of the Courts as it existed before the Code of Civil Procedure. If any part of the common law should have been flexible, that should have been, for it was made almost entirely by the Judges. And yet both here and in England, while they expressed their regret at the state of things, they were compelled to declare that the evils of the system were too deeply rooted to be removed by any power short of the Legislature. Whenever the Legislature did interpose, the Courts refused to go beyond the strict letter of the statute. No fact of early English history is more certain than that the existence of equity, as a separate system, was owing to the rigid adherence of the common-law Judges to form; in other words, to the iron inflexibility of the common law. Equity

itself soon fell into the same predicament. It would not at any time have been thought proper or safe for the Courts to disregard an established precedent at law or in equity, upon the idea that the circumstances of the community had so changed as to make the precedent oppressive. Decisions have been frequently overruled, it is true, but upon some such excuse as that they were made by a divided Court or an inferior one, or with reference to particular circumstances, or without sufficient consideration.

In almost every instance where an improvement has been made in the laws, it has come from the Legislature. Had society been left to the discipline of the common law, whether it be called flexible or inflexible, the most cruel and bloody of criminal systems would still have shamed us; feudal tenures with all their burdensome incidents would have remained; land would have been inalienable without livery of seizin, and wives would have had only the rights which a barbarous age conceded them.

Even in the matter of contracts, that portion of the common law where the attribute of flexibility would have been, if ever, desirable, what do we still see? While it can not be denied that, in nine instances out of ten, tenants hire houses in the belief that landlords must repair them if necessary; that tenants who agree to repair, have no suspicion that, if the house is burned, they are bound to rebuild; that when a creditor accepts part payment in full satisfaction, the bargain is supposed to be binding; that an instrument under seal, signed by an agent in his own name, but expressly declaring that he signs for his principal, is considered by both parties to be obligatory upon the principal; yet upon each of these points the common law holds otherwise, and has obstinately refused for hundreds of years to accommodate itself to the undoubted intentions of the parties whose rights it determines.

Either the common law had within itself the flexible, elastic, and accommodating elements, which would have enabled the Courts to adapt it in these respects to the expanding exigencies of society, or it has been greatly misunderstood or misrepresented by the opponents of a code.

The second of the reasons for considering a code more fa-

avorable to progress than the common law, is, that in all those particulars in which the common law does take hold of the business and usages of society, and make use of them in its jurisprudence, it does so not so much by way of incorporating those usages into the law, or indeed making any change in the substance of the law itself, as by way of interpreting the acts and intentions of parties, and applying fixed principles to the ever-changing concerns of human life; in all which respects, a code may and should be more liberal than the common law. Thus it is that by the present Code, not only are the particular anomalies rectified, which have just been mentioned, but by sections 801, 802, 809, 811, and 1,829, the details of the law of contracts are made subordinate to the intentions of the parties, ascertained not by inexorable rules of legal construction, but by all the light which can be thrown upon them by law, usage, and surrounding circumstances, except in those few cases where, for reasons of public policy, an absolute rule has been established.

Section 1,829, it will be seen, is in these words:

"Except where it is otherwise declared, the provisions of the foregoing fifteen Titles of this Part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, where ascertained in the manner prescribed by the chapter on the INTERPRETATION OF CONTRACTS, and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

The usages of society vary with its wants and its pursuits. The law refers to those usages because the parties contract with reference to them, and they must be taken into account when it considers what these parties ought to do and what they ought not to do. In this way, and in this alone, has the common law adapted itself to the exigencies of society, and in this respect the present Code goes not only as far as but farther than the common law.

Having thus considered the principal objections to the codification of the law, it should next be considered whether there are advantages in it. Assuming that it is possible to have a body of written law in a convenient form, and in scientific order, containing the materials and framed in the manner

already described, what benefits will it confer? In the first place, it will enable the lawyer to dispense with a great number of the books which now incumber the shelves of his library. In the next place, it will thus save a vast amount of labor, now forced upon lawyers and judges, in searching through the reports, examining and collecting cases, and drawing inferences from the decisions, and so far facilitate the dispatch of business in the Courts. In the third place, it will afford an opportunity for settling, by legislative enactment, many disputed questions, which the Courts have never been able to settle. In the fourth place, it will enable the Legislature to effect reforms in different branches of the law, which can only be effected by simultaneous and comprehensive legislation. Thus, for example, the closer assimilation of the law of real and personal property, and the changes in the relation of husband and wife, as to property, can not be effected by any other means so wisely and safely, as by a general code. The making of a code involves a general revision of the law. It is, indeed, in this way alone that such a revision seems practicable. The occasion is thereby afforded to look at the law of the land as a whole, to lop off its excrescences, reconcile its contradictions, and make it uniform and harmonious. In the fifth place, the publication of a code will diffuse among the people a more general and accurate knowledge of their rights and duties than can be obtained in any other manner. This is an object of great importance in all countries, but more especially in ours. If every person can have before him, in an authentic form, the laws which are to affect his property and govern his conduct, he can have an additional guarantee of his rights, and a better acquaintance with his duties. Here, more than anywhere else, all classes of citizens interfere in all the affairs of the State. They elect, directly, nearly all the officers who make, administer, or execute the laws. If in Holland, or in Germany, or France, a civil code has been found beneficial, much more is it likely to be beneficial to us.

So far as the choice lies between law to be made by the Legislature and law to be made by the judiciary, there can not be a doubt that, whatever may be the determination elsewhere, the people of this State prefer that theirs shall be made by

those whom they elect as legislators, rather than by those whose function it is, according to the theory of the Constitution, to administer the laws as they find them. Hence, the idea of a code has taken such hold of our people that they have made provision for it by their organic law.

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### LEGAL SYSTEM OF NEW YORK.

Address to the Law Department of the British Social Science Association, November 12, 1866.

THE Executive Committee of the Association having invited me to deliver the inaugural address of the session, for the Jurisprudence Department, and having signified a wish that I should take for my subject the codification of the laws of New York, the duty devolving upon me is simply narration. I am to give the history of our codification, its aims and its results. If, in doing so, I speak of myself, you will pardon me, I know, since I shall do it only in two instances where it seems impossible to avoid it; and in all other cases I shall speak only of the commissions of which I formed a part.

The law of New York is in substance the law of England, with such modifications as custom or statute may have introduced. The substratum is your common law. Our Constitution explains it thus: "Such parts of the common law, and of the acts of the legislation of the colony of New York, as together did form the law of the said colony on the 19th day of April, 1775, and the resolutions of the Congress of the said colony, and of the Convention of the State of New York, in force on the 20th day of April, 1777, which have not since expired, or been repealed or altered, and such acts of the Legislature of the State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same."

We had, also, previous to the last revision of the Constitution, a judicial system fashioned upon the model of yours,

with a Chancellor, Vice-Chancellors, and common-law Judges, and a final appeal to the Upper House of the Legislature, the Senate; the Chancellor sitting with the Senate to review the judgments of the common-law courts, and the Judges in their turn sitting in like manner to review the decrees of the Chancellor.

At the time of the last revision, which was in 1846, public opinion had been so developed by previous discussions respecting the defects of our legal system, that the Court of Chancery was abolished, a Supreme Court was established having general jurisdiction in law and equity, and two provisions of this character were made: the first, that the Legislature should appoint three Commissioners "to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as to the said Commissioners shall seem practicable and expedient," specifying "such alterations and amendments therein as they shall deem proper"; and, the second, that a like number of Commissioners should be appointed to revise the practice of the Courts of Record, and "report thereon to the Legislature, subject to their adoption and modification from time to time."

Under these provisions two commissions were constituted, which may be distinguished as the Practice Commission and the Code Commission, by which five codes have been prepared, intended to embrace the whole law of the State, common as well as statute, and styled respectively the Political Code, the Civil Code, the Penal Code, the Code of Civil Procedure, and the Code of Criminal Procedure. Each of these forms a separate volume, and, together with a sixth, the Book of Forms, profess to exhibit in one body our whole system of general laws.

The portion of the law first taken hold of was the Civil Practice. When the bill constituting the Practice Commission was pending, it happened that I drew a sentence, to be inserted in the bill, and prepared a short memorial, which, being signed by some fifty members of the Bar, was presented to the Legislature, asking, in substance, for its adoption. The sentence which I had drawn was thereupon inserted and passed in these words:

"And it shall be the duty of the said Commissioners to provide for the abolition of the forms of action in cases at common law, and for a uniform course of proceeding in all cases, whether of legal or equitable cognizance."

The arguments for this change were as follows: Passing by the forms of action, as being too clearly mischievous to admit of serious debate, and as falling, of course, if the distinction between law and equity as separate systems were to cease, let us suppose the question to be whether this distinction shall be kept up. What is meant by the distinction? Law and equity ought to mean precisely the same thing, and there should therefore be no occasion for a fusion between them. But, unfortunately, that which is called law is only a part of the legal system of America and England; equity is the complement of it; so, that which is called law is only a portion of law, and that which is called equity is only a portion of equity. How this happens all lawyers know. It grows out of legal procedure; it does not spring from distinct, inseparable rights; it does not inhere in the nature of things. Our legal nomenclature has, it is true, legal estates and equitable estates, legal rights and equitable rights; but, strictly speaking, these mean only that a certain class of one's rights are cognizable in a court of law, and another class in a court of equity. Reason for keeping up the distinction there was none, except that it had been so used from time immemorial; which was no more a reason for that than it was for adhering to the post-coach after the railway was established. It could not be said that the same judicial mind was incapable of grasping the two systems, since in the court of last resort the appeals from the Judges had always been heard by the Chancellor, and the appeals from the Chancellor had been heard by the Judges, and since, moreover, the same Judges were now vested with original jurisdiction in both law and equity. It was hard enough to have one judicial officer, called a chancellor, sitting to nullify or to supplement another, called a chief-justice; but, where the same person was both chancellor and chief-justice, it was not to be endured that he should spend one day in rendering a judgment which he was to spend the next day in nullifying. It could not be said that the separation of law and equity was

merely a division of judicial labor; for there were three conclusive objections to that view: first, that there was often great uncertainty whether the remedy in a given case was in equity or at law, and the separation was to that extent a snare; second, that the two systems often worked at cross-purposes with each other, one nullifying what the other had done; and, third, that one system was called in to help the other, because each separately was incapable of doing complete justice, and this was an unnecessary burden upon the suitor. Let us suppose two or three cases, to illustrate the observations: B has purchased an estate, belonging to A, an infant, which, under the authority of a private act of the Legislature, has been sold by order of the Court of Chancery. A sues at law for the estate, alleging that the order did not pursue the act, and was therefore without jurisdiction. The case comes successively before two Judges; both think that the order did not pursue the act, but one holds that the order is not void, and the remedy is in equity to open it; the other holds that the order is void, and the remedy is at law to recover the estate. In this case the separation is a snare. Again, A sues B to recover an estate; B's defense is a contract to sell and convey to him, under which he has been let into possession, but has received no deed, because he has failed to pay all the purchase-money within the time agreed on. In a court of law, A must recover; but in a court of equity B may be relieved from the forfeiture and nullify the judgment. This is a case, not of division, but of opposition of labor. It can only be obviated by allowing equitable defenses to legal demands; which, being done, strikes at the root of the separation, and falsifies the theory on which it rests. Lastly, A sues B in equity to rectify a deed. This Court makes the rectification, and sends the plaintiff to law to sue upon the deed as rectified. Here is the case of an unnecessary and grievously burdensome division, hardly more defensible than that which should compel a person, having a letter to write, to write part of it at Lincoln's Inn and the rest after many days at Westminster.

Such were among the reasons for abolishing the distinction between legal and equitable suits; and the fundamental proposition with which the Practice Commission began was this:



"The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing, are abolished, and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights or the redress or prevention of private wrongs, which shall be denominated a civil action."

Another very important question then presented itself to the Commissioners, which was this: "Shall the various provisions which this fundamental change requires be enacted by themselves, as in an ordinary statute, or shall a code be prepared containing all the law on the subject of judicial remedies in civil cases, both that which is to be newly made and that which is to be left as of old?" It will be remembered that the Constitution had not imposed on the Practice Commissioners the duty of preparing a code; they were to revise the Practice; the task of codification was laid especially upon the Code Commission. It appeared, however, to the Practice Commissioners most expedient, while they were making the changes, to present them in the form of a code, because, by bringing the whole of the law on the subject under the eye at once, the effect of the changes upon other parts would be best perceived by themselves, and best understood by others. The changes were so great and far-reaching that there seemed to be danger of confusion and uncertainty in their application to the parts not changed, if the whole were not brought together and repeated anew. The reasons for a code of other parts of the law applied also to the law of procedure. It was beyond all doubt possible to be done. The practice of the Courts had been set down in books over and over again. That it was also expedient seemed scarcely to admit of doubt. Law should be in a reasonable compass and an intelligible form. Though the objections commonly made to a code, that it can not provide for all cases, that it begets uncertainty, and is less flexible than customary law, apply some of them with more and some with less force to a code of remedial than to one of substantive law, none of them appeared to be entitled to much consideration; certainly not enough to outweigh the manifold advantages of a code; such particularly as scientific order, convenience of access, and the saving of labor. It was therefore decided not only that the changes should be made which I have mentioned,

but that a code should be prepared containing the whole law of procedure. In carrying out this design, it is provided that a suit shall be commenced by the service of the summons. The plaintiff is to set forth his case in a complaint, stating the facts concisely, without evidence or argument, and asking for such relief as he thinks himself entitled to. A mistake in respect to the relief is, however, not to do him a prejudice, for the Court is to give him any relief to which he appears entitled, whether he asks for it or not; and, that a mistake even in his statement of facts may not do him a prejudice, the Court is empowered to allow him to amend by conforming the pleading to the facts found on the trial. The defendant is to meet the complaint by demurrer or answer; and the plaintiff may in certain cases reply to the answer. There the written allegations are closed, and the case is set for trial. The trial may be by the Court, by jury, or by referee. If money only, or specific real or personal property, or a divorce, be demanded, the trial is to be by jury, unless a jury is waived, or a long account is involved. In other cases the trial is by the Court, with power, upon consent of parties, or in certain cases without consent, to send the trial to a referee. When the facts are thus ascertained by verdict of a jury or by the finding of the Court or referee, the judgment follows, according to the right of the case, whether such as was before denominated legal, or such as was denominated equitable. If execution is issued and returned unsatisfied, the defendant may be brought before a Judge, and examined about his property, and, if anything is discovered which the sheriff could not reach, it is applied to the judgment.

Such is the briefest account that I can give of the history and scope of the New York Code of Civil Procedure. The same Commissioners proceeded then to prepare a code of Criminal Procedure, and with these two works their labors terminated. The Code of Civil Procedure, or the substantial part of it, was immediately enacted by the Legislature. It went into effect on the 4th of July, 1848, and has ever since remained the law of the State. Though the opposition to it was great at first, and the treatment it received from many of the Judges and lawyers such as I do not care to describe, it had neverthe-

less some friends on the bench and at the bar, and has now so firmly established itself that I do not believe there is a man in the State who would return to the old system. The Code of Criminal Procedure has not yet been acted upon by the Legislature of New York. But, in the mean time, it has been adopted by ten of the States and Territories of the Union, while the Code of Civil Procedure is now the law of sixteen of them.

The Code Commission first organized by the Legislature broke down, and became extinct in 1852. I drew a bill for its resuscitation, which, after much opposition, was enacted by the Legislature. By the first section of this act three new Commissioners were named, whose duty it was made to reduce into a code all the law of the State not already codified by the Practice Commission; by the second section, the Commissioners were directed to divide their work into three portions: one, the Political Code, to embrace the laws respecting the government of the State, its civil polity, the functions of its public officers, and the political rights and duties of its citizens; another, the Civil Code, to embrace the laws of personal rights and relations, of property and of obligations; and the third the Penal Code, to define all the crimes for which persons might be punished and the punishment for the same. By the third section, the tenure of office of the Commissions was fixed, and it was declared that they should receive no compensation whatever; by the fourth section, they were directed to report to the next session of the Legislature a general analysis of the Codes projected by them, and at each succeeding session the progress made to that time; and, by the fifth and last section, they were directed to distribute the Codes, as fast as prepared, among the Judges and other competent persons for examination, after which they were to reexamine their work and consider the suggestions made to them, then reprint the whole and send it to all the Judges, and to certain other officers, six months before presenting it to the Legislature.

The Commission, thus reorganized, completed its labors last year, having prepared, distributed, revised, reprinted, and redistributed the three Codes of substantive law which had been intrusted to its hands. The last finished of the three, the Civil Code, not having been issued from the press till October, 1865,

the whole work of this Commission remains to be acted upon by the Legislature of New York. Meantime, the Civil and Penal Codes have been adopted by the Legislature of the Territory of Dakota.

The mode of proceeding was this: A careful analysis was in the beginning made and published. The Political Code was first taken up, then the Penal Code, and lastly the Civil Code. In their preparation, the plan was first to collect all the existing laws on the different subjects, then to reconcile what was contradictory, ~~strike out what was superfluous, obsolete, or mischievous~~, and, where there appeared to be deficiencies, arrange the whole in scientific order, and express each section in as concise and exact language as possible. It will be readily perceived how rapid the process of condensation thus became; as, for example, after treating of obligations in general, it became unnecessary to repeat any of the rules there set forth, when the time came for treating of the obligations arising from particular transactions. Now every lawyer is obliged to purchase and read the same thing in many different forms. Thus, in a treatise on sale, he will find the greater part of what he has already read in a treatise on contracts. Let us take, for illustration, any particular title of the Civil Code—that, for instance, on negotiable instruments. The first process was to collect all the decisions and statutes on the subjects of bills of exchange, promissory notes, checks, bonds, bank-notes, and certificates of deposit, so as to make sure, if possible, that nothing heretofore decided or enacted, and still remaining, was omitted. After this came, first elimination, then addition, then arrangement, and, last, expression. When authorities were irreconcilable, one was omitted and another was retained, or both were modified. When they appeared unjust, they were rejected. New provisions, which were considered desirable, were introduced. The whole was then placed in what appeared to be a logical and scientific arrangement; and the language of each section or article was considered and reconsidered, written and rewritten, printed and reprinted, till it appeared as short and precise as it could be made. Notes followed the sections, containing explanations and references to adjudged cases. In this way, the various rules applicable to the negotiable instruments which I

have enumerated were reduced into one hundred and seventeen sections of the civil code. Here is one of the sections, with the substance of the note appended, which will serve as an example, section 1,793 :

“The acceptance of a bill of exchange admits the capacity of the drawer to draw and endorse it; and, if written upon the bill, it also admits the same to be genuine and binding upon the drawer, but it does not admit the signature of any endorser to be genuine.”

The note refers to four American and six English adjudged cases, and mentions a particular case as one not founded in reason, and therefore to be disregarded.

The Civil Code consists of 2,034 sections, each section being intended to give by itself a distinct rule of law, and corresponding generally to the article in the Continental codes. It has four general divisions: the first relating to persons, the second to property, the third to obligations, and the fourth containing general provisions applicable to the other three. The first division, after an explanation of the civil condition of the different persons in the State, minors, adults, persons of unsound mind, and Indians, sets forth their personal rights, and declares their personal relations, under the heads of marriage, divorce, husband, wife, parent, child, guardian, ward, master, and parent. In the second division are the laws respecting property, movable or immovable, the various interests therein, its acquisition by occupancy, accession, transfer, will, or succession; the restrictions on accumulation and alienation; the conditions and qualifications of ownership, uses, and powers; the making, interpretation, and execution of testaments; and special provisions respecting corporations, copyright, shipping, and navigation. The third division deals with obligations in all their extent and variety, whether springing from contract or from operation of law; the definition, interpretation, transfer, and extinction by performance, offer of performance, prevention of performance, or other means; the object and consideration of contracts, the parties thereto, and the consent given by them, whether free or obtained by duress, menace, fraud, undue influence, or mistake; and, after these general subjects, the particular subjects are treated of sale, ex-

change, deposit, loans, hiring, service, carriage, trust, agency, partnership, insurance, indemnity, guarantee, lien, and negotiable instruments. In the fourth division the different kinds of relief are specified which the law gives for the violation of private rights, and the means of enforcing their observance, whether compensatory, specific, or preventive, and the measure of damages, where compensation is given. There are here also provisions respecting the special relations of debtor and creditor, and certain maxims of jurisprudence.

The labor was almost incredible. Some idea of it may be formed when one is told that the sections were written and rewritten many times, and printed and reprinted still oftener. After all there are, I doubt not, many omissions and many errors. All that I will venture to affirm is, that no labor was spared in the preparation, that the work is as perfect as the mind bestowed upon it could make it, and that it is to be preferred to the shapeless and incongruous mass said to contain the law of America and England.

Do not suppose it to have been pretended or imagined that every case which can arise has been foreseen or provided for. The language of the Civil Code is very explicit on this point. Thus:

"§ 6.—In this State there is no common law in any case where the law is declared by the five codes. § 2,034.—The rule, that statutes in derogation of the common law are to be strictly construed, has no application to this Code. § 2,038.—All statutes, laws, and rules, heretofore in force in this State, inconsistent with the provisions of this Code, are hereby repealed or abrogated."

Therefore, if there be any rule of the common law not mentioned in the Code, it will continue to exist as it was before; while if a new case arises, not foreseen and therefore not provided for, it will be decided, as it would now be decided, by analogy to a rule expressed in the Code, or to a rule omitted, and therefore still existing outside of the Code, or by the dictates of natural justice.

Perhaps I ought not to close these observations without taking notice of three objections which I have found to be often stated by those who would otherwise prefer a code: first, the difficulty of passing it; second, the temptation to tamper

with it by frequent amendment; and, third, the glosses likely to be put upon it by false interpretation. Let us give what seems to be a sufficient answer to each. A code may be passed in one of these ways: It may be considered in the Legislature section by section, and thus passed as any other act of legislation is passed. This was the case with regard to the Revised Statutes of New York in 1830, and an extra session of the Legislature was held for that purpose alone. Another method is, to subject the Code to a critical examination by a select committee of the Legislature, and then to pass it as amended and reported by such committee. That was the case with regard to the Revised Statutes of Massachusetts. A third method is to take it from the hands of its framers, having provided for such examination and criticism while in their hands as to give the best assurance of care and accuracy. That was the case with the French Codes. The New York Code of Civil Procedure was passed mainly as it was first reported. The second objection has, I think, no foundation in fact. There will be, of course, occasion for some amendments at first, when the Code is upon its first trial, as there is occasion for a good deal of adjustment when a new piece of machinery is first worked, but, as soon as all the parts are adjusted, there will be less disposition to change, as there will be less need of it. If an amendment be necessary, it is made with more care and greater security than in an ordinary statute, since it is made by substituting an amended section for the previous one. Let any one look at the Code Napoléon, and he will see how few of the original articles have been abrogated or changed. The third objection bears equally on all comprehensive legislation. Probably no statutes have ever been the subjects of so much judicial interpretation as Magna Charta and the Statute of Frauds; yet who would wish them never to have existed? The Constitution of the United States has been the subject of infinite debate, judicial and legislative, ever since it was promulgated, yet all Americans appeal to it as their guide in peace and their security in war. Every statute, grave in character and involving great interests, will be greatly debated; but that is no reason against its existence, or against an effort to render it more perfect or better understood.

The work, whose origin and history have been thus briefly told, is the first attempt ever made to codify the common law of England. How it has been performed it does not become me to say. If it should prove useful, either as law for any portion of my fellow-men, or as model or suggestion for others, the reward will be more than equal to the service.

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## CODIFICATION OF THE LAW.

Correspondence between the California Bar and Mr. FIELD, November 28, 1870.

GENTLEMEN: Your letter of June 28th was handed to me in San Francisco, as I was on the point of leaving, else I should certainly have accepted your invitation.\* I promised, instead, to give you in writing something that I should have said; but, until now, I have not had leisure to write all I wished.

You are already familiar with much that has been done in this State, in the way of codification. In some respects, indeed, you have gone beyond us. For, though New York has caused the preparation of a code or series of codes of the whole body of the law, divided into five portions, and known as the Civil Code, Penal Code, Political Code, Code of Civil Procedure, and Code of Criminal Procedure, she has enacted only a portion—about a third—of one of the five, while California has adopted two of them; that is to say, the Codes of Civil and Criminal Procedure, in nearly their completed state. Your example has been followed by the other Pacific communities—Oregon, Nevada, and Washington—and by nearly all the inlying Territories between the sea and the Mississippi.

Why New York has paused in the work of law reform it would not be difficult to explain. The pause, however, is not likely to be of long duration. It requires no prophet to foresee that our people, with all the other English-speaking communities, will yet insist upon having the whole body of their law in a form accessible and intelligible to all who are governed

\* An invitation to address the Bar of California.



by it. Whether New York will keep the lead depends upon herself. In one respect, indeed, she has already lost it, for the honor of being the first to enact a code of the common law of England belongs, not to England nor to New York, but to Dakota, one of the youngest, but most vigorous, of our Territories.

That a general and comprehensive code of the principal branches of the law is very much needed is, to my mind, most evident. I know that many hold to the opposite opinion, but this opinion appears to me rather the prepossession of lawyers in favor of things as they are than the result of reasoning.

Our law is in a state of chaos. Nothing will bring it out of chaos but a code. These two propositions, if true, are decisive of the question of general codification. For the truth of the first, I appeal to you and to every lawyer of experience or study. Look at our libraries, listen to the arguments at the bar, read the decisions from the bench.

Taking at hazard a volume of California Reports, the twenty-third, I have asked a friend to tell me how many cases are reported in the volume, how many citations of authorities there were, and the sources from which they were derived, and he has informed me that 153 cases are reported, that the citations were 1,394, being an average of nine to each case, and that they were derived, 683 from California, 277 from New York, 120 from England, 110 from Massachusetts, 43 from the Federal Courts, and the rest in unequal numbers from twenty-two different States. And, as I like upon occasions to fortify myself with the authority of great names, I take the following passage from a pamphlet published last spring by the present Lord Chief-Justice of England, in which, referring to the proposed revision of the English law, he says: "We seem to be making no progress whatever toward reducing to any intelligible shape the chaotic mass—common law, equity law, crown law, statute law, countless reports, countless statutes, interminable treatises—in which the law of England is, by those who know where to look for it, and not always by them, to be found."

The truth of the second proposition will, I think, appear upon a little consideration. The chaotic state of the law arises, of course, from the vast mass of unarranged, and sometimes discordant, material. To take this material, separate the discord-

ant parts, analyze, arrange, compress, remold the rest, is to educe order out of chaos. The result is a digest or a code. The difference between the two is so well stated by Mr. Justice Willes, in his dissent from the second report of the English digest of law commission, that I will quote the whole, as follows:

"I respectfully dissent from the report, for the following reason: Because, fully agreeing that a first-rate, modern digest of English law is to be desired (for professional use), I think it will, when made, after all, be only a makeshift for a code, or rather series of codes. Quite apart from the authority and example of so many other countries, which can hardly all be mistaken, a code is preferable to a digest in many points of view. A digest gathers and compiles what has been decided and ordained, and, among other relics, it will preserve the conflicts of common law and chancery and the rest; whereas a code must needs, once and for all, lay down uniform rules of justice to govern every Court. Thus a code will swallow up at once mischiefs of detail, the instances of which would choke a digest. Moreover, a digest will be limited to English reports and treatises, and so far as regards affairs peculiarly our own, such as real property, this exclusion of foreign systems may be tolerable enough; but, as to mercantile and maritime affairs, there will be so much opportunity for choice and improvement thrown away. It seems even possible that a really well-considered code, not restricted to a digest of our own jurisprudence, but embodying improvements suggested by a comparison of our own laws with those of other countries, might contribute something to a great object—the gradual formation of international mercantile and maritime law."

This short statement is, to my thinking, an unanswerable argument. The experience of the English Commission is another. In its first report, dated in May, 1867, it expressed the opinion that "a digest of law is expedient," and, in regard to the means of procuring it, recommended that "a portion of the digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared." Pursuant to this recommendation, three members of the bar were selected to prepare specimen digests, embracing the subjects, first, of bills of exchange, including promissory notes, bank-notes, and checks; second, of mortgages, including liens; and, third, of rights of way, water, and light, and other easements and servitudes." But the second report of the Commission, dated in May of the present year, holds the following language: "The gentlemen whose assistance we have had have laid before us materials of considerable value, and have enabled us to form con-

clusions as to the conduct of the entire work. But we think it unadvisable to continue any further this mode of proceeding." The appointment of a permanent commission was then recommended. It is to this report that the dissent of Mr. Justice Willes was appended. One of the three gentlemen selected to prepare the specimen digests has since addressed a letter to the Lord Chancellor on the subject of codes and digests, in which he says that "the digest commission, judging from the completed part of the specimen digest which I was commissioned to prepare, or from those framed by my learned colleagues, concluded that it would fill a hundred volumes."

It is easy to see why a digest should be of inconvenient length. Being a collection of adjudged cases and legislative enactments, the different parts will run into each other, and must needs be full of repetition and contradiction, while the code is a digest reduced to its elements, where nothing is repeated, and each principle is taken by itself and ranged with cognate principles only. To illustrate by example: a treatise upon bills of exchange will be sure to contain also the law of contracts, as applicable to bills, and refer to thousands of adjudged cases; in like manner, a digest will contain a citation of those cases, and notes of the points decided in each; while a code will send to the chapter on contracts all that relates to contracts, and retain in the chapter on bills only what is peculiar to them. In this way the hundred volumes of digest may be reduced to five volumes of code.

I have thus endeavored to show that, in the present state of our law, a code is a necessity. But, if it were not necessary, it would, in my opinion, be expedient for several reasons. It would reduce the laws of the land to an accessible and intelligible form, and thus bring them within reach of the people, who are to regulate their own conduct by them, and who should be able, in great measure, to judge for themselves of their legal rights and duties. It would enable the legislative department to make intelligently those reforms which all believe to be needed, to lop off unsatisfactory or superfluous rules, and reconcile conflicting ones, changes which can be effected only by simultaneous and comprehensive legislation. And it would lessen the labor of Judges and lawyers, enabling both to dis-

pense with the larger number of those books which now incumber the shelves of their libraries.

But, great as are these advantages, some will say they are overcome by certain disadvantages, the chief of which are the supposed inability of a code to provide for the future, its supposed uncertainty, and its supposed inflexibility.

To the first objection, it may be answered that a code will provide for the future as well as law in any form is capable of doing it. If there be any law, written or oral, it can be stated in words and placed in a code. The objection means nothing, unless it assumes that the code will undertake to exclude all law except that which it contains, an assumption not founded in fact. The Civil Code prepared for New York does not profess to contain all the law.

"All that it professes is, to give the general rules upon the subjects to which it relates, which are now known and recognized, so far as they ought to be retained, with such amendments as seemed best to be made, and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the Code, it is to be hoped that analogies may nevertheless be discovered which will enable the Courts to decide. If, in any such case, an analogy can not be found, nor any rule which has been overlooked and omitted, then the Courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield, in *King vs. Hay*, 1 W. Bl. 640, trusting to future legislation for future cases. . . . Therefore, if there be an existing rule of law omitted from this code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists; while, if any new rule, now for the first time introduced, should not answer the good ends for which it is intended, which can be known only from experience, it can be amended or abrogated by the same law-giving department which made it; and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided—that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code, and therefore still existing, or by the dictates of natural justice." \*

The second objection, of supposed uncertainty, rests upon this argument: that, after every effort to condense, arrange, and make plain, language will still be liable to different interpretations. But condensation and arrangement do not conduce

\* Introduction to completed Civil Code.

to uncertainty. On the contrary, they are the best help to perspicuity. All language is liable to misconstruction; that, however, is not an objection to the use of language. Every line of the Statute of Frauds, said a great English Judge, is worth a subsidy. But was there ever a statute so loaded with interpretation and commentary? The Constitution of the United States is a most beneficent instrument; but, after eighty years, the Courts have not yet done with deciding upon its construction.

The third objection, of supposed inflexibility, has as little merit as the other two. It means, of course, that when the Courts decide, without a code, they have greater liberty of decision than with it, and that this liberty is a good thing. The answer to the objection is, first, that such a liberty, if it existed, would not be a good thing. No Judge should have power to decide a cause without a rule to decide it by, else the suitor is subjected to his caprice. The second answer is, that the Courts have not greater liberty to decide right without a code than with it. The rules which govern the Judges in their decisions are contained in precedents. A code is a collection of the general rules thus contained.

"Another way of stating the objection is, to say that, while the common law is expansive, a code does not expand or adapt itself to the expanding exigencies of society. A different phrase for the same idea is, that the common law is elastic and accommodating, and that a code will be the opposite. Now, to say that a law is expansive, or elastic, or accommodating, is as much as to say that it is no law at all. The real significance of the objection, if it has any significance, is, that it is better to let the Judges make the law as they go along, than to have the lawgiver make it beforehand; for, if the Judges are to decide according to known rules, those rules can be written by the lawgiver as easily as they can be spoken from the bench, or taken down by the reporters. And even though, in particular cases, the Judges should fail to find such rules, and should have to make rules as the cases occur, that, too, can be done as easily when the known rules are placed in a code as when they repose in the breasts of Judges, or in the leaves of reports. So long as a code is confined to the rules of law as they now exist, it is neither more nor less expansive than the common law. When the inquiry concerns new cases, it is divisible into two parts, one relating to those cases which are foreseen, and the other to those which are not foreseen. Those which are foreseen the lawgiver can provide for, and it is his duty to provide for them. Those which are not foreseen can not be provided for, except by directing the Courts to decide

according to the analogy of existing rules, when there is such an analogy; and, when there is none, then to decide according to the dictates of natural justice." \*

These considerations serve to show that even an old community like England can not get on much longer without a code. How much stronger is the argument in respect to a community like yours! Even New York has not half the impediments in the way of reform that obstruct the path of England; but California has scarcely any at all. A State yet in its infancy—for twenty years mark only the beginning of life in political institutions—can make or reform its laws without infringing upon vested interests or ancient prejudices, or the usages of generations. For such a State, before all others, there can not be a doubt about the advantage of putting all its laws into a written and systematic form; in other words, making codes of them. To import into such a State the chaotic mass which is called the law of England, is like bringing over from beyond the sea a half-ruined house to dwell in, instead of building for ourselves.

In looking about for plans or models, perhaps you will look at the Civil and Penal Codes which have been prepared for New York. It may be natural for you to do so, since you have already adopted our Codes of Civil and Criminal Procedure, parts of our system, and that fact may induce you to look at the rest. It would be sheer affectation in me to appear indifferent about the opinion you may form of their fitness to serve you for examples. I am very sensible of their defects; I know better than any one else what an amount of labor they have cost, and how impossible it is that they should not show mistakes and omissions. Nor have I forgotten the eloquent protest of Macaulay, prefixed to the draft of the penal code for India:

"To the ignorant and inexperienced, the task in which we have been engaged may appear easy and simple. But the members of the Indian Government are doubtless well aware that it is among the most difficult tasks upon which the human mind can be engaged; that persons placed in circumstances far more favorable than ours have attempted it with very doubtful success; that the best codes extant, if malignantly criticised, will be

\* Introduction to completed Civil Code.

found to furnish matter for censure in every page; that the most copious and precise of human languages furnish but a very imperfect machinery to the legislator; that, in a work so extensive and complicated as that in which we have been engaged, there will inevitably be, in spite of the most anxious care, some omissions and some inconsistencies, and that we have done as much as could reasonably be expected of us if we have furnished the Government with that which may, by suggestions from experienced and judicious persons, be improved into a good code."

Emboldened by this opinion, and bespeaking no less indulgence, I will venture to recommend to you the Civil and Penal Codes prepared for New York. I am certain that they are far better than no code at all, that the general plan upon which they are constructed is right, and that, whatever errors experience may make apparent in the execution, are susceptible of simple and easy remedy.

They have been now three years published, during which time you may have seen many criticisms, friendly and unfriendly. But this, I think, you will have observed, that the unfriendly criticism comes principally, if not exclusively, from those who do not desire to believe in a code at all, and who disprove and reject the Codes of Civil and Criminal Procedure which you have thought it wise to adopt, and with which, if I am not misinformed, you are quite satisfied. Indeed, I think I may say that hostility to the proposed codes goes hand in hand with hostility to the union of law and equity, and to all codification.

This hostility, it is true, does not greatly trouble me, who have seen the Code of Civil Procedure treated in New York, first with derision, and then with hate; ridiculed, vilified, dreaded, misconstrued, but winning its way all the while, till the opposition to it has dwindled to insignificance; who have seen the principle of the same code winning, in England, first attention and then assent, till a bill, founded upon the same theory and aiming at the same ends, has passed the House of Lords, under the advocacy of the Lord Chancellor. Let me quote three clauses of this bill:

1. "Equity, or the rules and principles which govern the Court of Chancery in the administration of justice, shall henceforth be blended and united with the common law of England, and (so far as there is any differ-

ence) shall control and modify the same, and supply the defects thereof, to the intent that henceforth there may be no division in the jurisdiction of the several courts, but that equity and common law, so united as aforesaid, may be administered in all the aforesaid courts without difference or distinction, and, in case of any conflict of jurisdiction, the jurisdiction which has hitherto been exercised by the Court of Chancery or by the Court of Admiralty shall prevail from time to time.

2. "Every right of suit or action, and every ground of a title to relief, now recognized by or capable of being enforced in any court of equity, shall, subject to any rules of Court made in pursuance of this act, be recognized by and enforced in the High Court of Justice, and every divisional or other court thereof.

3. "Any answer, plea, or defense in any suit, action, or other civil legal proceeding, which has hitherto been available in any court of equity, shall, subject to any rules of Court made in pursuance of this act, be available in the High Court of Justice, and in every divisional or other court thereof."

Now, let me show you what the Chief-Justice of England, writing of this bill, declares concerning the fusion of law and equity: "No man can be more sensible of the discreditable anomaly which the distinction between law and equity produces in our jurisprudence. I have long felt that the existence of two distinct and in many respects antagonistic systems of law—'of two systems of judicature,' to use the language of the Commissioners, organized in different ways and administering justice independently of one another, on different and sometimes opposite principles—of rights acknowledged in the one system, rejected or controlled in the other—is a standing reproach to our law, as that of a wise and enlightened people, which ought not any longer to be endured. I concur most cordially in thinking that this anomaly ought to be removed, and law and equity made one. I agree that, in whatever courts or departments of our judicial organization justice in particular cases may be administered, one uniform system should prevail, and all conflict of law or jurisdiction be impossible."

Among the objections made to the Civil Code prepared for New York, is one, of which I will here take notice, merely observing, in respect to the rest, that they are of less importance, and relate chiefly to verbal corrections and matters of detail. This objection is, in substance, that compression has been carried to excess, and the Code is too short. By this, I suppose,



is meant, that too few rules have been given. Now, as the avowed purpose was to give only general rules, the objection must be, either that the purpose was wrong, or that, the purpose being right, there has been in the execution of it an omission of something which, according to it, should have been inserted—that is to say, of important general rules. As to the purpose, all that I need answer is, that *a code* was intended, which is, in its very nature, a collection of general rules. If a *digest* only had been proposed, there would have been undertaken, not a collection of general rules of law embraced in one volume, but a collection of decisions and statutes extending through many volumes, just what the English are now proposing. As to the execution of the purpose, I can only say that, if any important general rules have been omitted, they can be pointed out and inserted; and, until that is done, no great harm can happen, since all existing rules, omitted from the Code and not inconsistent with it, are saved and remain still in force; the repealing section being that “all statutes, laws, and rules heretofore in force in this State, *inconsistent with the provisions of this Code*, are hereby repealed or abrogated.”

But let us see how far this assumption of unnecessary compression is justified by the fact. We may satisfy ourselves in one of two ways, either by pointing out the rules which have been omitted, and should have been inserted, or by comparing this code with others. As to the former, I leave the critics to put into words what they would have inserted; as to the latter, I will compare the New York Codes with the most famous codes of the modern world. In doing so, it should be borne in mind that certain subjects, placed by the Federal Constitution specially under the charge of the Federal Government, have hardly a place in the codes of the States; as, for example, shipping, navigation, bankruptcies, copyrights, patent-rights, admiralty, and maritime jurisdiction. There are three methods of comparison: first, by comparing all the New York Codes with all the codes of a foreign state; another, by comparing our civil code with some other civil code; and the third, by comparing particular subjects as treated in the different codes. Now, let us compare, first, all the codes of New York with all the codes of France. The Civil Code of New York has 2,034

articles (called sections); the Penal Code, 1,071; the Political Code, 1,126; the Code of Civil Procedure, 1,885; and the Code of Criminal Procedure, 1,054—in all, 7,170. The five French Codes have the following number of articles: the Code Civile, 2,281; the Code de Commerce, 648; the Code Penale, 484; the Code de Procedure Civile, 1,042; and the Code d'Instruction Criminelle, 643—in all, 5,098. The New York Codes, therefore, have, altogether, 2,072 more articles than the French.

If it be objected to this comparison that the Political Code ought not to be counted, because there is nothing analogous to it in the French, I answer that this is not entirely so, since the Political Code has provisions respecting domicile, the promulgation of statutes, and the like, which subjects are provided for in the French Civil Code; but, leaving the Political Code out of the question, and deducting its 1,126 articles, there will still remain in the four other New York Codes 46 more articles than in the five of the French.

Next, let us place the civil codes alone side by side, and observe with what result. Take the 2,281 sections of the French Civil Code, and add to them the 648 of the Code of Commerce, and we have in the two 2,929. But we must eliminate the articles on subjects outside of the Civil Code of New York, or scarcely within its scope; that is to say, those in the French Civil Code on prescription, arrests, judiciary, sequestration, absentees, the respective rights of property of married persons, and the articles of the French Code of Commerce on bankruptcies and insolvencies, navigation, tribunals of commerce and the bourse, separation of goods, prescription, traders and their books of account, and we have a total of some 750 articles to be deducted from the 2,929, leaving 2,179 French against 2,034 New York, making a difference of only 145 articles more in the two French codes, civil and commercial, than in the Civil Code of New York.

Turning, now, to the civil codes of other nations, we find that of Sardinia to have 2,415 articles, that of Russia 1,471, and that of Austria 1,502. I do not say that these comparisons are exact as to the relative amounts of material in the different codes, since the articles are often differently arranged,

and the modes of expression vary; but they show approximately the measure of condensation in each.

But, thirdly, a comparison still more exact may be made by taking the spaces given to particular subjects in the two systems. Thus, the subject of bills of exchange and other commercial paper is disposed of by the French Code in 80 articles, while the New York Code gives 117 to the same subjects. In the French Code, insurance, average, and contribution have 98 articles; in the New York Code, 167. Partnership, including mercantile corporations, has in the French Code 47 articles; in the New York Code the two subjects have 124. Property real and personal, with all its incidents, modes of enjoyment and transfer, extends through 585 articles in the French Code, and in that of New York through 511, including the 50 on corporations. There is, besides, a feature of the New York Code not yet mentioned, which adds to its value, and that is, the reference to adjudged cases at the end of the sections. This gives to the Code many of the advantages of a digest combined with a code. Those references are designed to justify and explain the text. If, instead of reference, the point decided in each case were stated, the approach to a digest would be very close; since it is not necessary to a modern digest, any more than it was to the Roman Pandects, that all the decisions or opinions should be collected, but only such as are material to an understanding of the law.

I need extend the comparison no further. Enough has been shown to make it certain that the charge of too great compression, if good against the proposed Civil Code of New York, is equally good against all the modern codes.

In conclusion, let me take the liberty of exhorting you to proceed, with the accustomed energies of Californians, and, with all practicable dispatch, to prepare and enact codes of the whole body of your law. If, in doing so, you can make use of those prepared for New York, I shall certainly be gratified; if you can improve upon them, so much the better. You have a commission, now sitting, able to prepare the work for your Legislature; and that body, I trust, will not let pass the great opportunity of making itself the lawgiver of not only the half-million of people now within your borders, but the future mil-

ions who are to succeed them, and, not only those, but, by force of their example, the vast population of the whole Pacific regions, for all time to come.

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## REASONS FOR THE ADOPTION OF THE CODES.

Substance of an address before the Judiciary Committee of the two Houses of the Legislature, at Albany, on the 19th of February, 1872, on the Codes.

GENTLEMEN OF THE COMMITTEE: Twenty-three years ago the Commissioners on Practice and Pleadings reported to the Legislature complete Codes of Civil and Criminal Procedure. These still await your action. Thirteen years ago the Commissioners of the Code reported the Political Code complete, and five years later they reported complete the Civil and Penal Codes, thus completing the system of codification which the Constitution had prescribed. These last three Codes, like their complements and predecessors, the completed Codes of Procedure, remain to be acted upon. My purpose now is to recall your attention to these works undertaken by express command of the Constitution, and to urge upon you the expediency and duty of acting upon them without further delay.

In the performance of this task I shall endeavor to show, first, what these Codes are; secondly, why they have not been acted upon; and, thirdly, why they should be acted upon now.

These works, five of them in all, making, with the Book of Forms, six volumes, are, or, rather I should say, profess to be, a collection, in a compact and easily accessible form, of the general rules of our law, civil and criminal, substantive and remedial, or, in other words, "a complete digest of our existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, molded into distinct propositions, and arranged in scientific order, with proper amendments." They were prepared not as a matter of speculation, but in obedience to two separate provisions of the Constitution, and pursuant to repeated acts of the Legislature, for the pur-

pose of being enacted, so far as they were found worthy, and made part of the law of the State.

Why have they not been considered by the Legislature? The chief reason is that it has had too much to do, or, rather, it has done too much else. Take the record of a single year: Three hundred and forty-six statutes were passed at the session of 1871, which began on the 3d day of January and ended on the 21st day of April—that is, at the rate of nine a day. Some of these statutes had more than fifty sections; most of them were acts of special legislation. The whole number of public and general statutes was about ninety, although a majority of those were merely to amend previous acts. Of the rest, two hundred and fifty-seven were for amending charters, one hundred and twenty-three for amending private and local acts, one hundred and twenty-two for granting new charters, and twelve for extending the time to pay taxes in particular places. Now, if the Legislature will occupy itself with special legislation at the rate of eight or nine statutes a day, it is easy to see that it will have neither time nor inclination for the consideration of a code. “How, then, is a code to be passed at all?” you will ask. I answer, it can be only in one of two ways; either by holding an extra session for the purpose, as was done when the Revised Statutes were enacted, or by taking the codes from the hands of a select body, either a commission of lawyers or a committee of the Legislature. This was substantially the method adopted in Massachusetts for passing the Revised Statutes of that Commonwealth, and it was also the method by which the French Codes were adopted. There is nothing in this course inconsistent with the duty of any legislator. A personal acquaintance with the details of every bill for which he votes is not expected or required of him. He contents himself with knowing its general scope, and relies upon the good sense and fidelity of the committees by which it has been examined and reported, and also, perhaps, upon the judgment of other members more competent or more conversant with the subject than himself. Then the Governor approves a bill because, on the whole, he prefers that it should, rather than it should not, become a law. Every section may not be such as he would himself have framed if he had been draughtsman of the bill,

yet he does not, for that reason, withhold his approval. So a member of the Legislature, called on to vote upon the enactment of a code, may say to himself: "I have not thoroughly examined every section of this bill, but I understand its theory and design, and the general scope of its provisions; they have been framed under the authority of law; they have been a sufficient time before the public to enable any one desirous of studying them carefully to do so; they have been examined by persons competent to decide upon their merits, and I think that upon the whole it is safe to put them upon trial. They must, at all events, be better than the chaos that we have now. Great and glaring imperfections they are not likely to have after the ordeal they have undergone. Any hidden defects which experience may develop can be readily amended, and I am, therefore, willing to take them and try them." Such may be the wise conclusion of the most conscientious legislator. For my own part, I do not think it would be an advantage to have a code considered in a legislative body section by section, and amended or changed by a word or phrase inserted here or omitted there. A code is or should be an homogeneous work. It should have the impress of one mind, or at most of a few minds. Unity of design and uniformity of expression are important to it.

A discordant provision may seriously change the general plan; and, therefore, I would take the work as a whole, after it had been prepared with sufficient care by persons in whom I trusted. I do not think our Revised Statutes were made better by the minute criticism to which they were subjected in the Legislature at an extra session; on the contrary, I think they were injured by it. If they had been accepted as they came from the hands of the revisers, it would have been better for us all. It should be remembered that the draughts of the Codes prepared by the Code Commission were first distributed among lawyers and judges for examination and suggestion, prior to a final revision; that, after they had been thus widely circulated, they were subjected to most careful reëxamination, and that no pains were spared to make them as perfect as possible. I think it safe to say that a greater amount of examination by lawyers or by the public at large could hardly be obtained previous to

enactment, and I do not believe that a more painstaking commission could ever be organized. The Codes of Civil and Criminal Procedure have already passed the ordeal of special committees of the Assembly, and have been recommended for passage, the Code of Civil Procedure in 1853, and its counterpart, the Code of Criminal Procedure, in 1855. I must think, therefore, that the objection of want of time to attend to the subject has little weight.

Another reason, perhaps, why all the Codes have not been adopted, is the opposition which the Code of Civil Procedure, or that part of it which has passed into law, encountered from the beginning. And yet this opposition was but natural. The new system was a complete overthrow of the old. Nothing of the kind had ever before been attempted. It shocked the theories and prejudices of the profession, hardened by the incrustation of centuries. No wonder that it was received with amazement at the audacity of proposing it, with scorn for the reasoning with which it was supported, and with hate for its destruction of the learning of so many lifetimes. No wonder that lawyers scoffed at it, and judges rebuked it. We had then—we have now a little improved, perhaps—one of the worst judicial systems which an enlightened community ever established: thirty-two Judges of the Supreme Court elected in eight districts, each Judge chosen by one constituency to serve for seven others which had no part in electing him, and all with coördinate powers reaching through the State. Given these conditions, and adding this other, that three fourths of the Judges were amazed, indignant, and disgusted at this sudden, daring, and, as they thought, visionary innovation; and it must needs follow that, what with dislike, misconception, unwillingness to assist and willingness to embarrass, a series of discordant decisions in the different districts would crowd the reports, great and small, to the annoyance equally of the lawyer and the suitor. Then add to the other sources of trouble, that so much of the Code as was enacted was a part—confessedly a part only—of a larger work which was promised at the time the first was received, and which was necessary to make a harmonious whole, and you have a condition of things which would have created embarrassment at first even with the most favorably disposed bench and bar,

but which, when both were, as a body, hostile, made an easy working of the system impossible. It is not, therefore, matter of surprise, though it be of reproach, that, in one State at least which has adopted the New York Code, the New York interpretation of it has been rejected, and the citation of New York decisions forbidden. Thus it has happened that the enactment of the remaining portions of the Code of Civil Procedure—three fourths of the whole, for the portion enacted was but about one fourth—has been resisted and defeated from 1850 to the present day; and we are now working the new but imperfect machinery in connection with the old. Yet with all these disadvantages, and although the Code was received with such a preponderance of negatives at its introduction, I appeal to you to bear me out in the opinion which I express, that there are not now half a score of lawyers in the State who would, if they could, return to the old system.

A third motive for omitting hitherto to consider the reported Codes may, as I suppose, be distrust of their value, and consequent doubt of the expediency of touching them. To this doubt, I shall not think of opposing my own opinion. Of course, I set a value upon these works, for they have cost me too much anxiety and labor to be lightly esteemed by me; but I will ask you to take nothing upon my estimate. I will refer you to the estimate of others. The best test of the value of laws is experience, and I will give you not merely the opinion but the experience of others who, having opposed these Codes, have adopted them and found them useful. The Code of Civil Procedure, in whole or part, has been adopted into the laws of twenty-three States and Territories of this Union: New York, Ohio, Indiana, Kentucky, Missouri, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Nevada, California, Oregon, North Carolina, South Carolina, Florida, Alabama, Washington, Montana, Idaho, Dakota, Wyoming and Arizona. It has also been adopted for the consular courts of the United States in Japan. The Code of Criminal Procedure has been adopted in ten or more States and Territories. All the five codes have been adopted in California, and the Civil and Penal Codes in Dakota. Besides these results in our own country, I should mention the very sensible influence these



Codes have had upon legislation in India, and upon law reform in England.

With these recommendations and proofs before you, I think I can not be wrong in urging you to disregard the objections which I have mentioned—objections made to the enactment or consideration of the particular Codes now before you. There is another class of objections, however, which I ought to discuss, and they are objections to codes in general or to any codification at all. It has been said, and often said, and I suppose continues to be said, though with voices feebler and still feebler with each year, that an unwritten is, after all, preferable to a written law. You, of course, understand very well what is meant by these expressions “written and unwritten” law. In point of fact there is no such thing in this country at the present day as law known only through usage or tradition, and never committed to writing; or, if there be, it is that small and insignificant portion which is designated as “the course of the Court,” and relates to the merest forms. All law, deserving of the name, is written, and the distinction lies between that which is scattered up and down in enormous piles of cases, reports, treatises, and digests, without having had the sanction of the legislator, and that which has been enacted by the law-making department of the government. In other words, our law is all to be found in a written record of some sort, and the choice lies between a disjointed and a jointed record, between hundreds of thousands of little records scattered through thousands of books, without arrangement or plan, where each is difficult to find, and when found is quite likely to be confronted by another on the same subject disagreeing with it altogether; between these, I say, and one comprehensive record, sifted of incongruous and redundant matter, arranged in scientific order without contradictions and without repetitions. The objectors whom I am now answering reject the latter and prefer the former.

The reasons advanced by them, or the principal reasons, are three—the impossibility of foreseeing and providing for all future cases, the supposed uncertainty and the supposed inflexibility of a code. That all future cases can not be foreseen is certain; and, therefore, that the code can not provide for them specifically and expressly is equally certain, but no more can an

unwritten law provide for them ; if there be any difference in this respect, it is in favor of the Code, because that is framed with an endeavor to provide for the future so far as it is possible to do so ; whereas the unwritten law has no such aim and makes no such endeavor. It is the product of particular cases as they arise, is made for them, and limited to them. In a certain sense and to a certain extent the future can be provided for, but only by prevision and set purpose, not by deciding a particular question upon a particular state of facts, and having no authority as precedent beyond just such a state of facts. An edict of the lawgiver reaches further and takes in more cases than a decree of the Judge.

Here let me correct a misapprehension into which some are apt to fall. The province of a code is not to give all the rules of law, general and particular, but only such as are general and fundamental. Some one has estimated the whole number of rules laid down in the reports at two million. No man would dream of collecting and arranging all these in a code. Most of them are mere deductions from other rules more general ; the latter are those only which it would be useful or possible to bring together in a convenient form. For example, the Constitution of the United States is a code of the most comprehensive kind. When it declares that no State shall pass a law impairing the obligation of contracts, it gives a general rule which it is the province of jurisprudence to apply to particular transactions as they arise. The rule, nevertheless, provides for all future cases. So it is with that rule of the common law, that a contract against public policy is void. This is a rule of general application to all cases. But public policy changes from time to time, and a contract which is valid to-day may not be valid half a century hence. A covenant to bring slaves from Africa, for example, might have been considered in accordance with public policy two hundred years ago. It certainly is against public policy now. The rule, as stated, provides for every future case, but its application to the transaction in hand belongs, like the application of the constitutional provision which I have mentioned, to the domain of jurisprudence. When, therefore, I speak of the feasibility or expediency of a code, I refer to a collection of general rules. Of

these I assert that they will provide for future cases, and for more of them than any number of judgments which the Courts may render and the reporters throw upon the profession.

And here I may mention an advantage of written over unwritten law; of statute law over case law; of legislator-made law over judge-made law—namely, that the latter is always made at the expense and risk of the suitor. Two citizens differ about the validity or performance of a contract, and go into court. If the law is already established, it should have been written and made known to the citizen before the lawsuit began; if it is not established, then the defeated party, an innocent person, innocent so far as knowledge of the law goes, must suffer the loss of property, the expense of litigation, in order that it may be established: a great hardship, as it seems to me, and one which society should have relieved him from, if it were possible to do so, by making and promulgating a rule beforehand. These considerations, I must think, answer the objection so often made to a code, that it does not provide for every future case.

Next comes the objection of supposed uncertainty. A code is said to be uncertain because of its condensation; that is to say, wherever there are few words they must stand without those qualifying expressions which fix the meaning, which is equivalent to saying that many words tend to perspicuity, and few to obscurity. Now, the precise opposite of this I take to be the fact. We all remember the anecdote of an English Judge who, finding it extremely difficult to decide upon the interpretation of a very long document, at length discovered a few words in the margin which opened up the whole meaning. The language of a code should, of course, be chosen with care; but, if a reasonable degree of skill and attention is employed, greater precision and certainty may be assured than could ever be found in a series of accumulated reports.

The last objection to a code, which I am here to consider, is its supposed inflexibility. If by this is meant that a statute once enacted will stand without the risk of appeal by the Courts so long as the Legislature leaves it alone, while, on the contrary, a decision, though pronounced and pronounced again, may be overruled the next day or the next year, then I must insist

that the former condition is preferable to the latter. In this sense, flexibility is uncertainty, and, of course, inflexibility is certainty, which, so far from being a fault, is, to my thinking, a merit of the highest value.

If, however, by flexibility, as applied to the common law, it be meant that this law accommodates itself to the ever-changing circumstances and necessities of men, while a code could not thus adapt itself, I answer that, not only is the statement untrue in fact, but it would never have found believers except through a confusion of ideas. The common law, as I have said, is recorded somewhere, and wherever that may be its rules can be extracted and inserted in a code. The same words are as flexible in the one place as in the other. Therefore, the objection means, if it means anything, that it is better to have no record and no law than to have a code; better to have judges to make the rule at the same time that they apply it than to have the Legislature make it beforehand. The proposition thus stated will commend itself to no one in this country of popular institutions where it is a fundamental idea that the functions of government should be devolved upon distinct departments, where the Legislature can not encroach upon the Executive, and the judiciary can not encroach upon either.

The truth is, that the common law, or rather its administration, is, by turns, moved by two opposite impulses, and acts upon two irreconcilable theories: one, that the Courts make the law, as they go along, to suit the occasion; the other, that they can not make it to suit any occasion. It is common to hear the Judge say: "Here is a great hardship; the rule should be otherwise, but only the Legislature can change it"—language certainly inconsistent with the theory that they can make the law accommodate itself to the ever-changing circumstances and necessities of men.

These propositions must be true: one that every rule of law, flexible or inflexible, can be recorded in a code as easily as it can be recorded in the reports; another that, whenever a rule of the common law is expansive, it is because the language of the rule is general, and is applied to new questions as they arise under new circumstances—a condition just as applicable to a code as to a judgment rendered; and still another, that, in re-

spect to facility of amendment, the advantages are all on the side of a code, since here, so soon as a fault is discovered, it can be amended easily and with precision.

In what I have said I have made no distinction between the different Codes before you, but have regarded them all as equally defensible against the objections which I have considered; and, yet, I think the most vehement objector would hardly deny that the whole law of crimes and punishments should be written and published in the most accessible form possible, that he who runs may read. Nothing can be more abhorrent to our notions of justice than that the citizen should be exposed to danger of common-law crimes, of which perhaps he never knew, and of which few lawyers indeed could inform him.

Some persons who object strenuously to a code are yet willing to sanction a digest. The difference between them consists in this, that a digest is a collection of all the cases and all the statutes under a particular head of the law, while a code is an authoritative statement, scientifically arranged, of those general rules which flow from all these cases and statutes. For example, in a digest all the cases of which a negotiable instrument was the subject would be brought together under that title, while the code would contain, under the same title, only those general rules which are peculiar to that particular class of contracts. Any treatise on negotiable instruments will illustrate the difference, for it will consist, in a considerable degree, of discussions respecting contracts in general. In a code everything relating to contracts in general would be relegated to contracts, and those only which relate to negotiable instruments retained for that title. In this way a digest consisting of a dozen volumes might, in a code, be reduced to a single one. But the objections to a code, which I have been considering, apply equally to a digest, and the answers I have given to that apply here as well.

Having thus answered, as I hope satisfactorily, the principal objections advanced against a code, I proceed to consider some of its advantages. Here my task is comparatively easy, for, if I have answered the objections, I have at the same time shown some, at least, of the benefits. But these are not all.

A code will lessen the labor of Judges and lawyers in the investigation of legal questions. Instead of searching, as now, through large libraries filled with the judicial records, not only of all the American States, but of England, Scotland, and Ireland, it will be sufficient to examine the articles of the Code relating to the subject. Should illustrations be desired, the cases referred to in the notes will furnish all that may be needful.

Not only will there be a saving of labor but a saving of capital. The outlay required for the furnishing of law libraries will be greatly reduced. We forget how great is this outlay at present. Supposing the number of lawyers in the State of New York to be, as computed, ten thousand, and the average expense of their libraries to be three hundred dollars—too low, I think—the whole capital invested in lawyers' libraries will reach in this State alone three million dollars. This makes no account of the public libraries. I believe it is safe to estimate the whole capital invested in law libraries in this State to be not less than four millions. Three fourths of this, at least, may be saved, and a burden, grievous to be borne, taken from the shoulders of young men starting in professional life.

Besides the saving of labor and capital, there will ensue this additional advantage from a code, which is, that an opportunity will thus be afforded for settling vexed questions of law. We lawyers know that these vexed questions are many. We know better than all others into what a chaos our law has fallen. I have had the curiosity to examine, or rather have had examined, the forty-seventh volume of New York Reports, to see how many and what cases are cited in the arguments and opinions, and I am informed that there are 3,281 in all, of which 186 are from the Courts of the United States; from those of England, 531; New York, 2,190; Massachusetts, 120; Pennsylvania, 60; Connecticut, 30; New Hampshire, 21; Maryland, 27; Maine, 15; Vermont, 18; Michigan, 12; Wisconsin, 7; Minnesota, 5; Illinois, 3; New Jersey, 9; Iowa, 10; Virginia, 5; North Carolina, 10; South Carolina, 12; Rhode Island, 9; Alabama, 6; Georgia, 3; California, 3; Tennessee, 4; Ohio, 4; miscellaneous, 318.

A comprehensive code, aiming to reconcile contradictions and differences, will eliminate from the law the greater number, if not all, of the vexed questions to which I have referred. And not only may doubtful questions be freed from doubt, but needed reforms may be effected through a code with greater facility than is possible without it. Who would have ever thought of assimilating legal and equitable procedure but through the medium of a code? How, with the greatest ease and certainty, can the law of real and personal property be assimilated? In what way can these modifications, in the relations of husband and wife which modern society demands, be wrought with safety so readily as in the form of a general code of all the law? And, when a code is once formed, those necessary changes, which time and experience may show to be desirable, can be made without the confusion and uncertainty which are inseparable concomitants of our present annual legislation. We know how, in its zeal to make the punishment of abortion more severe, the Legislature virtually repealed existing laws, and so pardoned previous offenses. And we know, also, that a conviction and sentence were lately obtained under a Federal statute which had been repealed before the trial. These untoward events could not have happened if the State and the nation had had a Penal Code; for then, if an amendment or change were made, it would be referred at once to the proper article, and be readily known.

And last, but not least, of all the benefits of a code, is the diffusion among the people of a knowledge of the laws under which they live, and to which they must conform their conduct. Here, more than anywhere else in the world, is it needful that the people should know the law. They are supposed to make it. They, at least, are responsible for it. They, by their agents, administer it and execute it. If in France, and other parts of Continental Europe, where codes prevail, the people are found better acquainted with their laws than our people with ours, it is because they have them in a form accessible to all.

It may interest you to know the working of codification in India, and I will give you the following extracts from the opening address at the session of 1872, of the English Law

Amendment Society, delivered by Mr. Fitzjames Stephen, lately legal adviser of council in India, and successor of Macanlay in that office :

You will naturally ask how this process of codification has succeeded ? To this question I can answer that it has succeeded to a degree which no one could have anticipated, and the proofs of this fact are to my mind quite conclusive. One is the avidity with which the whole subject is studied, both by the English and by the native students in the universities.

The knowledge which every civilian you meet in India has of the Penal Code and the two Procedure Codes is perfectly surprising to an English lawyer. People who in England would have a slight indefinite rule-of-thumb knowledge of criminal law, a knowledge which would guide them to the right book in a library, know the Penal Code by heart, and talk about the minutest details of its provisions with keen interest. I have been repeatedly informed that law is the subject which native students delight in at the universities, and that the influence, as a mere instrument of education of the codifying acts, can hardly be exaggerated. I have read in native newspapers detailed criticisms on the Evidence Act, for instance, which proved that the writer must have studied it as any other literary work of interest might be studied.

A proof of a different kind of the success of the Codes is this : A few years ago an act was passed enabling the Government of India to legislate in a summary way for the wilder parts of India. The Punjab Government were accordingly asked whether they had any proposal to make as to the special laws for the government of as wild a frontier as any in the world, the districts between the Indus and the mountains. They replied that they could suggest nothing better than the Penal Code and the Code of Criminal Procedure, with one or two slight modifications and additions. It is a new experience to an English lawyer to see how easy these matters are when they are stripped of mystery.

I once had occasion to consult a military officer upon certain matters connected with habitual criminals. He was a man whose life was passed in the saddle, and who hunted down Thugs and Dacoits as if they were game. Upon some remark which I made, he pulled out of his pocket a little Code of Criminal Procedure, bound like a memorandum-book, turned up to the precise section which related to the matter in hand, and pointed out the way in which it worked with perfect precision. It is one of the many odd sights of Calcutta to see native policemen learning by heart the parts of the police act which concern them. The sergeant shouts it out phrase by phrase, and his squad obediently repeat it after him till they know it by heart. The only thing which prevents English people from seeing that law is really one of the most interesting and instructive studies in the world is, that English lawyers have thrown it into a shape which can only be described as studiously repulsive.



Having thus set forth, so far as I am able, within the hour which I allotted to myself, the reasons for which I do so, I close by urging you again to carry on to completion that reform and codification of the whole law, common and statute, which the State of New York began. It would be affectation in me to conceal my personal interest, though it is not that which I would put forward, but another and larger interest common to you and me, that of public benefit and State pride. We boast justly that we have inherited from our fathers that English law which proclaims and enforces the rights of men. Let us give ourselves cause to boast also that we have enriched the great inheritance. It was, I am fain to think, a felicitous opportunity which enabled our State to lead the way. She struck the blow that broke in pieces the unnatural, cumbrous, and oppressive procedure, which had hardened through ages. Behold, now, the influence of her name and example! The laws which she has caused to be written have already passed into the statutes of half the States, and form an inseparable part of their institutions. You will find them on the Western prairies, on the slopes of the Rocky Mountains, and on both shores of the southern sea. This is due, in great part, to the prestige of this populous and opulent Commonwealth, whose commerce embraces the continent and stretches to the Indies. You can keep at the head of this movement, if you will; but, if you falter, others will go on, and the Codes which you caused to be prepared, but have not as yet accepted, will come back to you on a reflux wave from the West, and you will then follow where you might and should have continued to lead.

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## THE CODES OF NEW YORK AND CODIFICATION IN GENERAL.

Address to the law-students of Buffalo, February 6, 1879.

YOUNG GENTLEMEN: If I were to say all that I think of the profession for which you are preparing yourselves and to which I belong, I should say nothing else in the course of this

address. It is only flippant and foolish persons who talk disparagingly of lawyers. They who are best acquainted with the history of civilization, or have studied most the science of government, know very well that no truer measure can be found of progress in either than the influence which the legal profession exerts and the respect which it receives. In stormy times, when oppressive laws and tyrannous acts were to be resisted, when political rights were to be defined and defended, or when a state was to be founded, they have been the foremost champions of freedom and progress. In times peaceful and prosperous they have too often relapsed into mere practitioners at the law, without an effort or a wish to make it better, content to keep it as they found it. The conservatism of lawyers has thus almost passed into a proverb. I should prefer to call it by a different name—not conservatism, but inertia. Of their integrity and honor there can be no surer test than their fidelity to their clients. When has that been broken? Leaders of armies have betrayed their country, chiefs of parties have been false to their friends and followers, trustees have despoiled those who have trusted them, but how few lawyers have been found betrayers of their clients! In a long and varied practice I have never found one. I congratulate you, gentlemen, that you are to enter this profession.

It is not, however, the character of the profession which you are about to join that I am to speak of to-night, but certain topics which greatly concern it and which I think will especially interest you on this occasion, the Codes of New York and codification in general. By the Codes of New York I mean not the Code of Procedure, under which we worked from 1848 to 1877, nor the Code of Civil Procedure under which we have worked, or tried to work, since, but the five Codes, which were prepared by commissioners appointed by the Legislature, pursuant to the Constitution of 1846. What I have to say to you, therefore, will relate to those Codes and to codification.

Reversing the order of subjects as thus stated, I will first ask your attention to the subject of codification. There is a prevalent impression among lawyers in this country against a general codification of the law. It would be difficult for them,

I suppose, to give a reason for this impression, but its existence is unquestionable. That it is a mistaken impression I believe, and my first object will be to show the mistake.

The impression, analyzed, appears to be twofold : first, that general codification is not possible ; and next, that, if it were possible, it would not be expedient. To meet the question fairly it is necessary at the outset to agree upon what is meant by a code. Not everything so called deserves the name. The true idea of it is a digest of all the general rules of law upon a given subject, arranged in distinct propositions according to a scientific method. It may be partial or universal ; as, for instance, it may be a military code, embracing only the armed forces of the State, or a code of public instruction, affecting the education of the people and nothing else, or a penal code, embracing all crimes and punishments known to the law. The possibility of such a digest should seem to be beyond dispute. It exists at this hour in most countries of the world ; it has existed in different ages ; it exists among ourselves in respect to special subjects. None of our law is now traditional ; all is written, though called unwritten, to distinguish it from that which is set down in statutes ; it is all, in fact, written somewhere, in the reports of the Courts, or in the treatises of jurists, or in the digests of compilers. What has been written once can be written again.

The task of the codifier is to gather together all the rules that can be found in statutes, reports, treatises, or digests, separate the partial from the general, lay aside the obsolete, reconcile the contradictory, condense by rejecting superfluous words and avoiding repetition, arrange the results in fit order, and express them in perspicuous language. The gathering together of the materials is a work only of diligence and time, the separation of the general from the particular is not difficult, if this maxim be taken as a guide, that, when a general rule is found and stated, the enumeration of particular instances under it, and the endeavor to provide for them also, will lead to embarrassment and failure, because it is impossible to foresee and provide for all particulars. For example, the Constitution of the United States declares that Congress shall have power to regulate commerce with foreign nations. This is general and comprehensive. If

the Constitution had proceeded to enumerate the particular instances in which Congress might act under this head, as, for example, by declaring that it might pass navigation laws and erect lighthouses, the mention of these particulars would either have been superfluous or have tended to restrict the meaning of the general provision.

The possibility of a general code being admitted or assumed, there remains the question of its expediency—that is to say, whether, in this country and among this people, it be desirable to have a digest of all the general rules of law by which they are governed in their daily transactions and according to which the Courts decide their differences, whenever unfortunately differences arise ; a digest intelligible in language and convenient in form ; in other words, a code. That it would be a convenience to the people for their instruction and guidance, who can doubt ! If it be desirable that they should know the laws by which their lives are to be guided, what better way is there to give this knowledge than to place it within their reach and before their eyes ? In religion you give them the written word, in morals you give them the written precepts of moralists. Why not in respect of law, which is a rule both of property and conduct, give them that also in the same form ? It does not suffice to show them a law library, with its long rows of reports, digests, and statutes, and to bid them help themselves. When they ask for bread, do not give them a stone. They want the law accessible and intelligible, and nothing will give them that but a code.

There is as much reason why the American people should have their laws in four or five pocket-volumes as there is why the French people should have theirs. A general code, containing the substantive law, or the law of civil rights and duties, as well as the law of remedies, could be easily placed in every household, if the people would but will it.

But not alone to the people would it be a convenience ; it would be a greater one to the lawyers and the Judges ; for to them it would be in a larger measure a saving of expense and labor. The burden of expenditure for law-books has already become for many of us too grievous to be borne. What it will become hereafter, who can say ? The multiplication of these

books is marvelous and appalling. Every State, every Court, pours forth its volumes, good, bad, and indifferent, confusing or contradicting each other; some of them strong in logic and rich in learning; others weak and poor in everything; and still others swollen with platitudes. All those the lawyer must buy and explore if he would avoid the risk of a surprise, or be ready to answer an unsound opinion or a mistaken quotation. The waste of expense is, however, less grievous than the waste of time and labor. The lawyer of to-day is overburdened and overworked; staggering under a load of statutes and precedents, able to find a case to prove anything, and sure to be confronted with another to prove the contrary, he is brought in despair to the conclusion that a lawsuit has become very much a game of chance. In the last volume of "New York Reports" nearly half the judgments are reversals. When it is considered that the judgments thus reversed were themselves rendered upon appeals against previous judgments and after two hearings in court, which, though before different Judges, must have suggested all the arguments possible to counsel, the reversals are unanswerable proofs of the hopeless uncertainty of our law.

The objections usually taken to a code are threefold: its inability to provide for every future occurrence, and its supposed uncertainty and inflexibility.

The ability of any system of law to provide for the future depends upon the generality or minuteness of its provisions. If it attempt to be minute, it will certainly leave some particulars unforeseen and of course unprovided for; but, if, on the other hand, it deal only in general provisions, it may be made sufficiently comprehensive. The ten commandments, it has been said, comprehend the sum and substance of the moral law. Though the civil law, without inspiration, could not be condensed in this wise, it would be possible to condense all its general rules within a few thousand articles. The Practice and Code Commissioners of this State did, many years ago, as will be explained hereafter, bring within the compass of seven thousand-and-odd sections all the general law of our time, from whatever source and wherever found. Should a case, however, occur now and then not within any provision of a code, it would be adjudged precisely as a case would be adjudged now,

which there was no statute and no precedent to cover. There would be no difference between the law of precedents and the law of a code in this respect. All that I affirm is, that whatever is now written in the statutes and in the books of reporters and jurists can be written in the book of a code, and that a defect is to be supplied in the same manner in both cases. Perhaps I can not better enforce my argument than by an illustration. The rule of law, that a contract is void which is against public policy, is a general one, proper to be stated; an enumeration of the particular contracts which would be of that character would not be proper; for the reason that while the general rule is universal, and covers all possible instances, the enumeration would certainly be defective, or, even if it were possible to make it full in one age, another would find it deficient, as the policy changes from age to age, however unchangeable the rule itself may be.

The objection of uncertainty assumes that, because language is imperfect, no expression can be chosen which will not be susceptible of different interpretations, rendering judicial decision still necessary to select the true one. Here, again, the answer is that uncertainty no more attaches to the written sentences of a code than to the written sentences of the judicial decisions, two or two hundred, from which the sentences of the Code may have been taken. All written, as all spoken language, is exposed to misunderstanding; that is, however, not an objection to language; and no more is it a valid objection to a code, that it can not be so expressed, be the pains taken with it never so great, that interest or chicanery may not suggest a meaning different from the one intended by the lawgiver. The Constitution of the United States is a great code in a small compass; the decisions and the commentaries to which it has given rise have swollen to hundreds if not thousands of volumes; yet there stands the instrument in its simple majesty, a monument of wisdom, dear to all our hearts and defended by all our hands. The remaining objection is the supposed inflexibility of a code. Sometimes the objection is stated in this form: A code is an iron band which can not be stretched to fit the growth of society; the law of precedents is a flexible garment which expands with the body-politic. To this it should be answered that the

exact contrary is the truth : it is the code that is capable of expansion ; it is the law of precedents that is not. The supposed flexibility of precedents is nothing but the application of old rules to new cases ; the rules themselves being already written, and the Courts not being able and not attempting to change them, as that would be usurpation ; but, when the Legislature adopts a code, it not only adopts a general rule for the Courts to apply, but it gives it such a form and places it in such a relation to other rules that any progress or alteration, which time may show to be necessary, can be easily and safely made. Here, again, let me give an illustration from the same part of the Federal Constitution which I have already quoted : " Congress shall have power to regulate commerce with foreign nations and among the several States." In the first half-century of the republic there was little occasion to use the power of regulating commerce among the States. The growth of their commerce in the second half-century seems about to lead Congress into a new field of legislation. Analogous to this dormant power, under the general language of the Constitution, is a dormant principle under the general language of a code, which the Courts may apply to instances that at the time of enactment had perhaps not entered into the minds of men.

Is it too much, then, to say that a general codification of our law is both possible and expedient ? We have, indeed, arrived at a period in the history of this law when its codification has become a necessity. More than thirty years ago the Constitution of the State required it ; and for these thirty years the Legislature has refused to obey, though yearly sworn to obedience. The condition has all this time grown worse and worse, and is now scarcely endurable. The delays and expenses of lawsuits, the uncertainty of their issue, the difficulty of advising clients aright, the heterogeneous mass of statutes, reports, and treatises, disjected members of one body—all these are shocking to the old lawyer and appalling to the new. What is the remedy ? What can bring order out of this chaos ? Nothing, in my view, but a general codification.

It is time now that I should speak of the Codes of New York, of those works which were prepared by commissioners

under the orders of the Legislature, and pursuant to the Constitution. . . .

Why these Codes have been neglected in New York, it would not be difficult to say. The resistance which the first Code provoked, the conservatism, or, as I prefer to call it, the inertia of the profession, and the late revision of the statutes, have been the causes. It is not surprising that such a change as the first Code produced should have encountered vehement opposition. Most of the lawyers looked upon it with disfavor, some for one reason, some for another: the equity lawyers because it had so much of the common law, and the common lawyers because it had so much of equity; the admirers of special pleading because it made useless their favorite learning; and all, or almost all, who had learned and loved the old ways, were averse to treading in the new. The resistance, however, gradually lessened and at last died away; but in the mean time the old had forgotten, while the young had never learned, that the fragment of 1848 had been completed by the same codifiers, and that four other codes had been added for the purpose of completing the codification of all the law of the land.

Thus, at the end of thirty years a generation, consisting mostly of persons who had attained majority after the enactment of the Code, looked upon it as they looked upon other parts of the established law. They were strangers to the arguments for and against codification, which had agitated their predecessors, and fell unconsciously into the traditions of their profession. This profession, as I have already hinted, is occupied, in its daily life, with questions of law as existing, of what the law is, and not what it should be. The thoughts of its members are of the actual which engrosses them, and they have little time and no inclination for the possible. Excessive occupation and limited study, except in the course and for the daily tasks of the profession, have made them strongly averse to change. They have no mind for new things, as they have as much as they care to do in minding the old. For these reasons the force of habit takes a stronger hold of lawyers than of most other men, and thus it is that they are praised as conservative and denounced as inert. To them codification means the abandonment of forms, phrases, and sometimes of substan-



tive rules, which, having mastered with labor, they have come to use with ease, and they recoil from an entry upon new studies and new fields of debate.

In 1870, twenty-two years after the enactment of the Code, the Legislature ordained a revision of the statutes. The revisers, ignoring the completed Code which the codifiers had prepared, and passing by the shapeless and tangled mass of statutes which cumbered the shelves of law libraries and made the heart of the searcher sick every day of his life, began with the Code, and after six years produced 1,496 sections, which they represented as part of a system of civil practice and convenient to be enacted before the remainder. Those sections the Legislature enacted, to take effect after another session. That other session came, the two Houses disagreed, and thus, while one Legislature was sitting, a law went into effect against the will of one of its Houses, solely because a Legislature that had gone out of office had so willed it. The second installment then came, with more than 1,800 sections. This has not yet been passed. It is not my purpose to make the present an occasion to criticise this work, either the first installment or the last, further than to show its effect upon general codification. That it has seriously interfered with the plan of codifying our law can hardly be denied by an intelligent observer. It is not comprehensive, which a code must be, and it is minute, which a code must not be. It professes to be what it is not, a code. This, as I have said, is a digest of all the law upon a given subject. This work, while it takes a name which implies comprehensiveness, is avowedly incomplete. Thus the fourth section, instead of defining the jurisdiction of the Supreme Court, declares that it shall continue to exercise the jurisdiction now vested in it by law, except as otherwise here prescribed; in other words, enacting that the Court has the jurisdiction which it has, and what that is must be gathered from, I know not how many ordinances, statutes, and reports. The work contradicts the theory in another respect: it is particular and minute, while a code is general and comprehensive; it undertakes to provide for every case by an enumeration of particulars, while a code provides for the same things by general description. Meantime the contest over it has made the name of code odious to

many who, by a natural mistake, have made the particular instance to stand for the general principle. While the thirteen chapters now on the statute-book are a serious hindrance to codification, the nine chapters would be greater, and so long as either or both stand in the way, though the other branches of the law might be reduced to a code, the civil practice would remain without codification, and before it could be undertaken with success these thirteen or two-and-twenty chapters would have to be taken to pieces, enlarged on the one hand and diminished on the other, so as to include every general rule and exclude every unnecessary particular.

Despite all these obstacles, gentlemen, I believe that a codification of our law is not far off. If I were an Englishman, speaking to Englishmen, I should express my conviction that not many Imperial Parliaments will sit at Westminster, before the enactment of that Code Victoria, which an English chancellor foresaw, as the counterpart and rival of the Code Napoléon. As an American, speaking to Americans, I venture to predict that the instincts of our people and the inexorable logic of events will hasten the completion of the work here sooner than in England, and that not many returning summers will find the State of New York without that which her citizens long ago commanded, "a written and systematic code" of "the whole body of the law." We might have it, for the work is ready, even before the last tower is raised over the new Capitol. Fortunate will he be who foresees it, prepares for it, and helps its coming; unfortunate he who shall resist, and be overcome!

## AN INTERNATIONAL CODE.

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### FIRST PROJECT OF AN INTERNATIONAL CODE.

An address before the British Social Science Association, at Manchester, October 5, 1866.

MR. PRESIDENT AND GENTLEMEN: Standing for the first time before the members of this Association, I must begin by making my acknowledgments for the honor which you conferred upon me some years ago by electing me a corresponding member. Though I have not been able to take part in your meetings, I have felt scarcely less interest in them than if I were present, and even take to myself a share of the self-congratulation which the actual participators must have felt. If I have not contributed to your transactions, I have been a humble sharer in the fame which the contributions of others have won.

The distinction which your Association has earned is, however, the least of its honors. The good which it has done in stimulating inquiry, concentrating opinion, and combining efforts toward the improvement of the law and the education and health of the people, would be a sufficient reward for all your labors, even if no distinction had been obtained.

The scope of your labors is not confined to your own country; it extends to every part of Christendom. So intimate is now the connection between all Christian nations that the social progress of one is sure to be felt more or less in the others. More especially is this true of your country and mine. We are bound together by so many ties that, forgetting for the present all things else, I will only think of the good we may

do each other, and the spirit of kindliness we may both promote.

The particular subject to which I am to bespeak your attention is international law. In discoursing of it my purpose will be to answer, so far as I may be able, these questions: 1. What is that which is called international law? 2. Who made it? 3. Who enforce it? 4. Are any changes in it desirable? 5. If so, how can they be effected?

Law is a rule of property and of conduct, prescribed by sovereign power. In strictness, therefore, there is no such thing as a human law binding the nations, since they have no human superior. They may, however, as they have in part done, agree among themselves upon certain rules, both of property and of conduct, by which they will pledge themselves to regulate their own conduct toward each other and the conduct of their citizens respectively. These rules form what is called sometimes international law and sometimes the law of nations. Neither expression is precisely accurate. There is a body of rules, more or less distinctly stated, by which nations profess to comport themselves in their relations with each other; but they are not laws, nor are they imposed upon nations, nor yet are they international. They are laws only in each state, so far as they are promulgated by the sovereign power of that state, and they serve international purposes. Take, for example, a treaty concluded between the United States and Great Britain; when ratified and promulgated by the treaty-making power in the two nations, it becomes a rule for both, by virtue of their compact, and a rule in each nation for its own citizens, by virtue of the promulgation by its own sovereign authority. For want, however, of a better designation, and adopting the suggestion of Bentham, publicists and statesmen now generally refer to this body of rules as international law. If the word law is to be retained, I should have thought the expression public law, or the public law of the world, a better one.

Who made these rules, or this international law if you so call it, is explained by the definition which I have given. It was made by the nations themselves, either through express compact with each other or through general practice; that is to say, by treaty or by usage. Publicists, I know, looking be-

yond the rules so made or sanctioned, have sought, in those moral precepts by which nations, not less than individuals, ought to be governed in their intercourse with each other, for guides in other circumstances; and statesmen and diplomatists have often fortified their arguments by reference to such opinions, and it has thus frequently happened that those precepts have been gradually adopted into the usage of nations. These views of the publicists are, however, to be regarded rather as suggestions of what ought to be the conduct of nations in particular circumstances than as a statement of established rules. They are entitled to the same weight in the decision of a national dispute as a treatise on natural law is entitled to in the decision of a case by the Courts of America or England.

Some writers are in the habit of treating the law of nations as if it were something above the nations, and having an authority superior to their will. In our late civil war, for example, it became the practice of certain persons to speak of the law of nations as a guide or warrant for the Executive in the conduct of the war, beyond the Constitution, and paramount to acts of Congress. This, I apprehend, was a mistaken view. The law of nations is only such because each individual nation adopts it, and so far only as it is thus adopted. It is legally, I do not say morally, or without just complaint from other nations, competent for any nation to reject the whole or any part of it, so far as its own citizens are concerned. The Parliament of England might enact, if it would, that no English court should decide, and no English subject act in a particular manner, even though that manner were enjoined by the law of nations, as understood by the whole body of Christendom.

Who enforce the rules, thus made or sanctioned, and known as international law? The nations themselves, first by applying them as occasion requires to litigants in the national tribunals; and, secondly, by punishing the nation which infringes them, in such manner as nations may punish each other; that is to say, by non-intercourse, or by force. The controversies respecting captures by land or sea, and the questions concerning the responsibility of individuals for the violation of private rights, are of course determined by the Courts, and, where the municipal law is silent, international usage is the rule of de-

cision. When a question arises between nations, it is debated and arranged between themselves, or submitted to arbiters, or decided by force.

The next question will lead us into a large discussion. Are any changes desirable in these rules of international obligation? The slightest acquaintance with the disputes which have arisen, and do now constantly arise, between nations, will convince us that the rules themselves are full of uncertainty and, in many respects, defective. If we make, for ourselves, an examination, even incomplete, of the subjects which fall within the scope of international law, we perceive at once how many of them are uncertain or require revision. Within it are embraced all the rules which should govern the relations of states with each other, in peace and in war. All of them spring from the intercourse of nations. If a people shut themselves up from others, as the Chinese attempted to do, building a wall between themselves and their neighbors, there can be no international law, as there can be no international relations. That condition, however, is unnatural and irrational. Man is a social being, and his nature impels him to intercourse with all the family of man. Whether this intercourse is demandable as a right, and if so when and by whom and upon what conditions and how it should be carried on, are the first questions which present themselves. From intercourse, as from a source, spring the rights and duties of those who carry it on, making it necessary to determine how far they who pass from one country to another retain their own nationality, and to what extent they subject themselves to the jurisdiction of the country which they enter. Hence arise the questions respecting the right of foreigners to liberty of religion, residence, and trade; their obligations to civil or military service; the liability of their property to taxation or other imposition, and its devolution when they die. Traffic brings with it contracts. These are to be expounded and enforced in different nations, and between the citizens of all. Thence comes that department of jurisprudence which, under the general title of the Conflict of Laws, has engaged so many minds and led to such profound investigations. The intercourse of nations is public or private. The former is

carried on by embassies, legations, and consulates. Here is required a large body of rules declaring the rights and duties of public ministers and consuls, with their attendants, their reception, residence, functions, and immunities. When private persons pass from one country to another, they go either for transient purposes or for permanent residence. In the latter case, there arise two opposite claims; on one hand that of expatriation, and on the other that of perpetual allegiance. Fugitives from one country into another have certain privileges; hence the practice of extradition, as modified by that right of asylum, which, older than Christianity, has been exalted by its spirit and precepts, and which it is the honorable boast of your country and mine never to have violated or rejected. The instruments of intercourse by sea; ships and those who navigate them; and they who pass and repass with them, and that which they carry; the control of them on the ocean and in port—all these are to be regulated by that body of rules of which I am speaking. Next are those rights of property which, acquired in one country, should be recognized and respected in another; the title to personal chattels and the title, quite as good, in my opinion, to the products of the mind; inventions for which patents are commonly issued; and writings, for which the law of copyright provides, or should provide, a sanction and a guarantee. Then there are the subjects of weights, measures, money, and postal service, which fall within the scope of international regulation. Passing from direct intercourse between nations to their rights, exclusive or concurrent, to things outside of themselves, we come to the subjects of the free navigation of the ocean, the fisheries, the discovery and colonization of islands and continents, and the right of one nation to an outlet for itself through the close seas or rivers of another. After these various topics regarding the relations of nations in a state of peace, we come to those of a state of hostility. Force or constraint is applied in three ways—one by non-intercourse, another by reprisal, and a third by war. I will speak only of the relations in war. First, in respect to intestine or civil war: when and how far may other nations interfere, and when may interference go so far as to recognize

a new nation out of the fragments of a broken one, and what is the effect of the separation upon the citizen of the different parts of the divided nation and upon the citizen of other states. Then in respect to foreign war, when it is justifiable, what must be done to avoid it, and what formalities must precede it. And when it comes, what must be the conduct, first of the belligerents and then of neutral nations; and in respect to the former, who may attack, who and what may be attacked, and in what manner may the attacks be made. Those questions being answered, embrace the whole subject of belligerent rights. But into what an infinitude of subdivisions do these topics divide themselves; explaining to what extent it may be truly said that, upon the breaking out of a war, all the citizens of one belligerent state become the enemies of all the citizens of the other; what may be done by one side to the citizens and property of the other, including the seizure and confiscation of debts or other property; how the persons and property of the enemy found in a country in the beginning of a war may be treated; whether private citizens, without commission from the Government, may assail the enemy; whether it be lawful to take or destroy private property on land or sea; whether all kinds of public property may be taken or destroyed; how public buildings and monuments of art are to be treated; what is the effect of war upon pending contracts; and what future traffic may be carried on between the citizens of the belligerent nations. Then, when we proceed to consider the conduct of armies toward each other, what are the rules of honorable warfare, what stratagems are allowable, the proper treatment of prisoners, the disposition of spies, the flag of truce, the armistice, and the exchange of prisoners of war—all these are subjects of international regulation. Turning from belligerents to neutrals, we come to consider what are the rights and what the obligations of the latter; what are the conditions of a true neutrality; what is a just blockade, and the effect of it; what things are contraband of war; and to what extent a belligerent may be supplied from neutral territory. When a state departs from its neutrality, and becomes an ally, the rights which then attach to her and arise against her form another



department of the rules which determine the relations and the rights of states.

This rapid and imperfect enumeration of the principal subjects embraced within the scope of international law will suggest, to those who are conversant with them, the uncertainty which hangs about many of them and the need of numerous amendments. Let us refer to some, by way of example. Take the case of recapture at sea. America has one rule, England has another, while France, Spain, Portugal, Holland, Denmark, and Sweden have each a rule different from either, and different from each other. It was in reference to such a case that Sir William Scott, the great Admiralty Judge, whose judgments command respect for their ability, even when they do not win assent to their conclusions, was obliged thus to speak: "When I say the true rule, I mean only the rule to which civilized nations, according to just principles, ought to adhere, for the moment you admit, as admitted it must be, that the practice of nations is various, you admit that there is no rule operating with the proper force and authority of a general law." Take the question respecting the effect of a declaration of war upon the persons and property of an enemy found in the country at the time. How important that it should be settled beforehand by a uniform rule! And yet the practice of nations is various, more various, even, than the nations themselves; for in the same nation the practice has varied with the interest or caprice of rulers. You had a controversy with the Great Frederick about the confiscation of the Silesian loan. The seizure of French ships in your ports, upon the rupture of the Peace of Amiens, and the detention by Napoleon of English subjects found in France, produced an immense amount of suffering, which might have been in great part avoided by the establishment beforehand of a proper rule. What articles are contraband of war ought to be settled and everywhere known. But you do not agree with us respecting them; you do not agree with most of the Continental nations. There must, however, be some rule, founded upon just principles, to which intelligent and impartial publicists and statesmen would give their assent, could they but approach the subject in a time

of peace, undisturbed by passions and enmities. The vexed questions respecting the right of neutrals to send goods by the ships of a belligerent, or to carry the goods of a belligerent in their own neutral ships—questions illustrated by the formulas, “free ships, free goods,” and “enemies’ ships, enemies’ goods”—are matters in which the trade of the whole civilized world is interested, and yet how unsettled! The obligations of a true neutrality, what are they? Do they permit the supply to a belligerent of ships and munitions of war? Do they require a neutral to prevent the fitting out and sailing of ships? Do they require a neutral to disarm and arrest bands of professed travelers or emigrants who are seeking to pass the border, with the real intent of making a hostile incursion? Take the case of the *Alabama*, to which I refer for no other purpose than illustration. Here is an instance where the people of my country think that you are responsible for all the damage done by that vessel. Your own people, I am told, are of a contrary opinion. Ought such a question to be in doubt; or, rather, ought there to be any such question at all? The security of property and the peace of nations require that there should be none such hereafter. Then there are grave questions respecting the doctrines of expatriation and allegiance, which have given rise to some misunderstanding already, and which may give rise to greater misunderstanding hereafter. It is time that the conflicting claims of ancient monarchies on the one hand, and of young republics on the other, were, if possible, reconciled. You have in the list of topics for discussion on this occasion that of the extradition of criminals as affected by the right of asylum. This is a subject which requires you to assert the right of society to protect itself against crime, and the right of humanity to an asylum from oppression. You have also in the list the subject of copyright. This is a question properly to be left to international regulation. We need a uniform rule, binding upon all Christian countries, and affecting not only the subject of copyright, but that of patents for inventions, money, weights, and measures.

I might continue this list to a much greater length. There is the question of the right of search, which has already given

rise to angry disputes, not yet quite settled ; there is the question of the right of nations inhabiting the upper banks of rivers or the shores of inland seas to an outlet to the ocean ; both of them greatly needing a just and ready settlement.

What might not be done for the prevention or mitigation of that greatest scourge of the human race, war ? First, by way of prevention. Let us suppose that the Governments of England and America were to commission their wisest men to confer together and discuss a treaty, for the express purpose of preventing war between them. Can there be a doubt that if these representatives should come together, animated solely by a love of justice and peace, they would agree upon a series of mutual stipulations, which, without compromising the dignity or independence of either country, would make it extremely difficult to fall into open war without putting one party or the other so completely in the wrong as to subject it to dishonor ? Whatever those stipulations might be, whether providing for an arbitration before an appeal to arms, or for some other means of adjustment, the same stipulations which would be inserted in a treaty between our two countries could be inserted also in treaties between them and others. Is it too much to hope that by this means the time may come when it would be held impious for a nation to rush into war without first resorting to remonstrance, negotiation, and offer of mediation ? Supposing, however, war to become inevitable, and two nations at last engaging in actual hostilities, how much may be done in favor of humanity and civilization by adding to the rules which the usages of nations have established for mitigating the ferocity and distress of war ! Could not private war, and war upon private property, be for ever abolished ? Could not more be done in the same direction as that taken by the late conference at Geneva, which produced such excellent effect during the last contest in Germany, in exempting surgeons and nurses from capture ? Could not the sack of a captured city or the bombardment of a defenseless town be for ever prohibited ? Might not such transactions as the storming of Magdeburg and San Sebastian, and the bombardment of Valparaiso, be made violations of the laws of war ? Could there not be a great improvement upon the rules which provide for the proper treat-

ment and exchange of prisoners? What, indeed, might not be effected if an earnest effort were made to lessen to the utmost its evils before the passions become aroused by the actual conflict of arms. Discarding at once the theory that it is lawful to do everything which may harass your enemy, with a view of making the war as short as possible—a theory worthy only of savages, and, carried out to its logical conclusion, leading to indiscriminate fire and slaughter, even of women and children—the aim should be, while not diminishing the efficiency of armies against each other, to ward off their blows as much as possible from all others than the actual combatants.

How can these changes, so desirable in themselves, be effected? I answer, by the adoption of an International Code. Every consideration which serves to show the practicability and expediency of reducing to a code the laws of a single nation applies with equal force to a code of those international rules which govern the intercourse of nations. And there are many grave considerations in addition. The only substitute for a code of national law—an imperfect substitute, as I think it—is judiciary or judge-made law. This is tolerable, as we know from having endured it so long, where there is but one body of magistrates having authority to make it. But when the judges of each nation, having no common source of power, and not acting in concert, make the laws, they will inevitably fall into different paths, and establish different rules. And when they do there is no common Legislature to reconcile their discrepancies or rectify their rules. Indeed, if there is ever to be a uniform system of international regulations made known beforehand for the guidance of men, it must be by means of an International Code.

How can such a code be made and adopted? Two methods present themselves as possible: one a conference of diplomatasts to negotiate and sign a series of treaties, forming the titles and chapters of a code; the other the preparation by a committee of publicists of a code, which shall embody the matured judgment of the best thinkers and most accomplished jurists, and then procuring the sanction of the different nations. The latter method appears to me the more feasible. The difficulties in the way will arise, not in the labor of preparation, but in

procuring the assent; yet, great as are these difficulties, and I do not underrate them, I believe they would be found not insurmountable, and that the obstacles and delays which the rivalries of parties and the jealousies of nations might interpose would finally give way before the matured judgment of reflecting and impartial men. The importance of the work is so great, and the benefits that will result from it in promoting beneficial intercourse, protecting individual rights, settling disputes, and lessening the chances of war, are so manifest, that when once a uniform system of rules, desirable in themselves, is reduced to form and spread before the eye, it will commend itself to favor, and the governments, which, after all, are but the agents of the public will, must at last give it their sanction.

Let us suppose this Association to make the beginning. There is no agency more appropriate, and no time more fitting. You might appoint at first a committee of the Association to prepare the outlines of such a code, to be submitted at the next annual meeting. At that time subject this outline to a careful examination, invite afterward a conference of committees from other bodies—from the French Institute, the professors of universities, the most renowned publicists—to revise and perfect that which had been thus prepared. The work would then be as perfect as the ablest jurists and scholars of our time could make it. Thus prepared and recommended, it would of itself command respect, and would inevitably win its way. It would carry with it all the authority which the names of those concerned in its formation could give. It would stand above the treatise of any single publicist; nay, above all the treatises of all the publicists that have ever written.

Is it a vain thing to suppose that such a work would finally win the assent, one by one, of those nations which now stand in the front rank of the world, and which, of course, are more than others under the influence of intelligent and educated men? The times are favorable; more favorable, indeed, than any which have occurred since the beginning of the Christian era. Intercourse has increased beyond all precedent, and the tendency of intercourse is to produce assimilation. When they who were separated come to see each other more and know each other better, they compare conditions and opinions; each

takes from each, and differences gradually lessen. Thus it has happened in respect to the arts, and in respect to laws, manners, and language. In a rude state of society, when men are divided into many tribes, each tribe has a language of its own; but, as time melts them into one, a common language takes the place of the many. Your own island furnishes a familiar example of the influence of intercourse in blending together different elements and forming a united whole. This tendency to assimilation was never before so strong as it is now, and it will be found a great help toward forming a uniform International Code. The tendency toward a unity of races is another element of immense importance. Germany will hereafter act as a unit. Italy will do likewise. In America no man will hereafter dream of one public law for Northern and another for Southern States. Even the asperity which always follows a rupture between a colony and the mother-country will give way before the influence of race, language, and manners, so far as to allow a large conformity of disposition and purpose, however impossible may be a reunion of governments. The relations between America and England are, or were till lately, softening under this influence; and, if Spain is ever governed by wiser counsels, she will make friends of her ancient colonies, instead of continuing to treat them as enemies, and will confer on them benefits, rather than wage war against them.

Would it not be a signal honor for this Association, rich in illustrious names and distinguished for its beneficent acts, to take the initiative in so noble an undertaking? Would it not be a crowning glory for your country to take it up and carry it on? Wearing the honors of a thousand years, and standing at the head of the civilization of Europe, England would add still more to her renown, and establish a new title to the respect of future ages, if she would perform this crowning act of beneficence. The young Republic of the West, standing at the head of the civilization of America, vigorous in her youth, and far-reaching in her desires, would walk side by side with you, and exert herself in equal measures for so grand a consummation. She has been studying during all her existence how to keep great States at peace, and make them work for a common object, while she leaves to them all necessary independence for

their own peculiar government. She does this, it is true, by means of a federative system, which she finds best for herself, and which she has cemented by thousands of millions in treasure and hundreds of thousands in precious lives. How far this system may be carried is yet unknown. It may not be possible to extend it to distinct nationalities or to heterogeneous races.

But there is another bond less strict, yet capable of binding all nations and all races. This is a uniform system of rules for the guidance of nations and their citizens, in their intercourse with each other, framed by the concurring wisdom of each, and adopted by the free consent of all. Such an international code, the public law of Christendom, will prove a gentle but all-constraining bond of nations, self-imposed, and binding them together to abstain from war, except in the last extremity, and in peace to help each other, making the weak strong and the strong just, encouraging the intellectual culture, the moral growth, and the industrious pursuits of each, and promoting, in all that which is the true end of government, the freedom and happiness of the individual man.

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## THE COMMUNITY OF NATIONS.

An address before the British Social Science Association, at Belfast, September, 1867.

At the last annual meeting of this Association I had the privilege of proposing to it a scheme for the formation of an International Code. A committee was appointed to prepare an outline of such a work, which we hoped might be submitted at the present meeting; but it has been found impossible to prepare the whole of it in time, and the report must be deferred to a subsequent session. Meantime, it may not be inappropriate or unprofitable to pass a few minutes in considering a kindred subject—that indeed which, as I think, would form the natural sequence and result of an enlightened International Code—the community of nations.

By this expression I do not mean a political union or an arrangement of any kind by which the independence of a nation may be compromised, for I am very far from that school of political philosophy which holds that one nation has a moral, or should have a legal, right to interfere with the internal affairs of another. The independence and equality of nations are essential articles of a just International Code, and the claim of one to intervene in the internal affairs of another can not be admitted without unsettling the foundations of government, and opening the way for anarchy and despotism. By the community of nations I mean a more intimate relationship than has heretofore existed, the pursuit together of their common interests, a closer study of one another, more frequent intercourse, increased sympathy, and a greater regard for the rights, susceptibilities, and welfare of each other. I would have the reversal of that ancient policy of states, which made them regard one another as hostile. I would have them turn from distrust, dislike, menace, aggression, and war, to sympathy and mutual kindness, to confidence sought and given, and to co-operation freely asked and freely granted, where coöperation can promote a common good not obtainable by separate action. Of course, it will be understood that I am speaking of a nation, as consisting of all its members, and not of any particular class or portion distinguishable from the rest.

The present may, perhaps, seem to be an inopportune moment for the advocacy of such a policy, when the nations of Europe appear to be whetting their swords for new and fiercer conflicts. If the world is at peace, there are signs of coming war. The doors of the Temple of Janus, though shut, seem trembling on their hinges, as if about to open, and, when once opened, who can foretell the hour when they will be closed again? But, even in such a moment as this, the voice of reason should not be silenced. Not a word should be left unsaid that may tend to make men hesitate before the final plunge.

That community of nations of which I am speaking is the natural fruit of the religion which we profess. It is also deducible as a necessary consequence from the doctrine of the brotherhood of man. But it is not my purpose to speak of it in



either of these aspects. I shall regard it in the light of interest and policy.

It appears to me that the true interests of nations are, in a great measure, coincident, and that the real advancement of one is not only not incompatible with, but is promoted by, the real advancement of the rest. The discoveries of Columbus, though at first they redounded most to the glory of Castile, have really advanced beyond all estimate the power and grandeur of England. They have enabled the people of these realms to advance their arts and their arms in either hemisphere; to encircle the world with their possessions, and to spread their language and their laws over a quarter of the globe. The invention of your Watt has made steam to do man's work all over the earth; the invention of our Fulton has sent the steamer into every river and sea; the genius of your Stephenson has driven the car with its horse of fire over the plains of France, and through the gorges of Italian mountains; and the genius of our Morse has bound continents and seas with a network of electric wire. If an English philosopher learns the secret of Nature, and decomposes the elements, a new domain is added to the science of the world. If an astronomer of France discovers a new planet, it is taken into all astronomy wherever taught or learned. Genius is universal. Poetry, philosophy, the sciences, and the arts are the common property of our race.

The comfort and happiness of man depend upon his material resources and his moral and intellectual condition. Whatever we obtain for our material wants, all that we eat, all that we wear, all that we dwell in, are of that physical world in which we live, affected by the labor which we bestow. The grandest structure of the earth and the most delicate fabric, the cathedrals, the castles, the ships, the docks, the railways, are but so many modifications made by man in those elements which the Almighty Father has placed at his service. To increase his power over these is to increase the comforts and luxuries which he can enjoy. One unassisted and alone can do little. The coöperation of another increases the power and tends to the enjoyment of both. A neighborhood thus advances the power and the resources of every individual in it.

The same rule applies to a nation, which is but an aggregation of neighborhoods, and to the world, which is but an aggregation of nations.

The happiness of a people thus depending upon the amount of their material resources and the extent of their moral and intellectual advancement, it follows thence that, if these can be increased by a particular policy toward another people, that policy becomes their interest. The question then is reduced to this: can the material resources and the moral and intellectual condition of a nation be best advanced by a policy of antagonism to other nations, or of isolation from them, or by the policy of mutual kindness and mutual beneficence, the greatest possible extension of intercourse, the most diligent study of each other's arts, manners, and laws, and the giving and receiving of kindly greetings and friendly aid? Reason gives but one answer.

Unfortunately, history exhibits a policy the reverse of that which reason would dictate. From the time when foreigner and enemy were synonymous terms, to the last great war, the nations have kept toward each other the attitude of menace and aggression. What ruler has thought of promoting the interest of any country but his own? What statesman, what minister, has studied the advantage of a people to which he did not belong? When have the representatives of two nations conferred together upon the best means of helping both, except against a third? The aggrandizement of one country at the expense of another, or without regard to it, has been hitherto the test of statesmanship, the boast of the ruler, and the pride of the citizen. The history of our race has been a history of violence; an almost unbroken record of national selfishness, jealousy, exclusiveness, and injustice. When one reads these chronicles of rapine he almost ceases to wonder at the too prevalent belief in the cruel and unchristian maxim that the natural state of mankind is war. He looks into history and turns over page after page, seeing little else than stories of battle and siege; he enters the galleries of the arts, and finds the walls covered with pictures of men cutting each other in pieces; he listens to music, and hears the chant of martial glory.

Nevertheless, I would fain believe that this spirit of violence is as far from a just philosophy as it is contrary to a holy religion. Man is not the tiger that he is thus made to appear. He has a kindlier nature, and a loftier aspiration, than are taught in bloody chronicle and song, or in old romance. The Almighty Father has subjected him to that great law of human happiness, that they who seek the good of others seek best their own.

Far be it from me to depreciate that patriotism which leads a man to prefer his country's welfare to his own, which makes her rivers and her hills inexpressibly dear, which renders him most tenacious of her rights and most jealous of her honor; nor will I deny that, if the two were incompatible, he might choose her good to the prejudice of another. But I insist that to be selfish is not to be happy, for any man or number of men. The same rule of morals and the same law of happiness prevail with nations as with individuals. If a private citizen is haughty and quarrelsome, he reaps the reward of his folly in the dislike of others and dissatisfaction with himself; while, on the other hand, if he endeavors to make his existence a blessing to those around him, he is sure to make it his own blessing. Isolation is the natural and proper state neither of men nor of nations. Our being is so constituted that we can not live altogether to ourselves. The most selfish person is incapable of continued enjoyment, to the exclusion of his fellows. The chief of an African tribe may think only of himself; he may dispose absolutely of the lives of his subjects and of all that they possess; he may rob, imprison, and kill, according to his own wicked pleasure, and he will live and die a brute in human shape. Let some kind influence develop his better nature; let him go out of himself and help his people, respect their rights and encourage their industry, and he will be lifted into the nature and dignity of a man.

Let us suppose such a change in the policy of states as I am endeavoring to recommend, and consider one or two of its natural results. One of them would be a simultaneous reduction in the armaments of Europe. What a burden would then be lifted from the shoulders of the people! The peace establishment of this continent, at the lowest calculation, keeps

in the land and naval services more than three millions of men, while the war establishment amounts to more than five millions, exclusive of extraordinary levies. Here are from three to five millions of hardy men in the flower of life, in the strength of manhood, withdrawn from productive industry. But not only is their labor lost, but other labor, to an amount impossible to estimate, is consumed in their support. If the existing armies were once dissolved, even without the restoration of the men to industrial pursuits, the gain would be enormous, as the cost of maintaining them would be returned to the pockets of the people. But if you set the men to work in useful employments—in the fields, the workshops, and the ships—what an additional and incalculable gain would accrue to the world! What a change would be wrought in the face of Europe if the vast armies which now encumber its surface were to be dissolved; if the multifarious uniforms of soldiers were to disappear from the garrison towns, and factories and villages filled with busy men were to take the place of those frowning fortresses which overlook every frontier and crown every considerable city! Let us pause a moment to ask why this is not done. For what purpose is all this display of force—this formidable array, covering sea and land? It is for menace, for aggression, for war. It is the substitution of force for reason in the affairs of men, of will for persuasion, of might for right. Is it not a scandal to the Christian name, and a reproach to the statesmanship of Europe, that these enormous armaments, so out of all proportion to any demand for domestic peace, should have continued so long; should go on increasing from day to day, till this fair quarter of the globe—the home of so many thoughtful Christian men and women, the seat of so many schools and universities; so covered with temples, libraries, galleries, and monuments—has become one vast camp, stretching from Gibraltar to Archangel?

On what earlier or later day that blessed era will arrive, foretold by prophecy and chanted in song, when wars will cease, it is not given me to know. But this I do know, that the present European armaments, besides being intolerable to the people, are a temptation to war, and while they continue on their present footing no man is safe.

Another result of the substitution of the policy of conciliation and coöperation for that of menace and aggression would be, the execution of those public enterprises so important for the world, which can hardly be undertaken and maintained by a single nation without the concurrence of the rest. Let me mention one of them—a canal across the Isthmus of Panama. Why should not the nations of Christendom unite in the execution of this great international work, and guarantee its neutrality under all circumstances of peace or war? What statesman of America, England, or France, might not covet the glory of such an achievement? The expense of a single campaign—I had almost said of a single battle—would cover the outlay. Solferino or Sadowa could state an account which would hardly fall behind the cost of this work of beneficence for all the ages, uniting oceans, saving life, and lightening toil. What a help to commerce; what a relief to the mariner, if instead of a circuit of so many thousand miles, and facing the tempests of Antarctic seas, the great ships were to pass smoothly in a single day from the Eastern to the Western Ocean!

But why should I pursue the enumeration of particulars? We can all foresee the benefits to accrue in a thousand forms from the adoption, for the intercourse of nations, of those Christian maxims which are received as rules for the intercourse of individuals.

Let us, for example, picture to ourselves the opposite consequences of the two lines of policy which have been described, and in doing so let us take the two nations to which we belong. On the one hand, we may look upon England and America frowning at each other across the Atlantic; mutually jealous, slow to redress injuries, and ready to offer or receive affronts. Stimulated by bad men, in the passionate madness of the hour, they rush into war for what is foolishly called the supremacy of the seas. Let it become an internecine war. We should fight each other by sea and land. There would be battles in the Atlantic, the Pacific, and the Indian Oceans. Wherever we could strike each other we should strike. You would batter down some of our towns, and we some of yours. Timid merchantmen flying from pursuing cruisers, burning houses

along the coasts, and ships sunk upon the sea, would bear witness to the madness and fury of the great contending nations. At the end of all, after each had burned and killed enough, one might be driven from the sea, leaving the other in undisputed supremacy. But would either be better off than when the war began? Would the beaten and humiliated combatant be as useful to the victor as before? Would the victor be wiser, better, or happier; to say nothing of that store of hate which would be accumulated and laid aside for the renewed strife of a later generation? Would the merchants of London and New York, or of Belfast and Boston, have gained by turning rich and useful customers into exasperated and impoverished enemies? Would the institutions of England or America be improved by the conflict? Would not the wealth and culture of both—all, indeed, which makes man better and happier in each—be lessened in the waste and desolation of the struggle?

Let us turn now to the other and more agreeable picture. We are here supposed to have discovered that there are ways of settling disputes better than by tearing each other in pieces. We have come to regard one another as brethren. Esteem and confidence have taken the place of hatred and distrust. We have learned to respect each other's opinions. We drive away or silence those who would stir up dissension between us. We mingle as freely with each other as with our own countrymen. We stand in the attitude of mutual teachers and helpers. Our rivalry has become a friendly competition in promoting our well-being. We are striving to outdo each other in social progress; in enacting the best laws, writing the best books, building the best houses and ships, and reaping the richest harvests. Your flag and ours are floating side by side—symbols of nationality, but not banners of menace—and our governments are acting as our agents, not to overreach or threaten, but to explain misapprehensions, reconcile differences, and further the mutual good-will of our people.

Ladies and gentlemen, what may be true of your country and mine may be true of other countries also. Let us study and inculcate the doctrine of the community of nations; and let us pray and hope for the speedy coming of that happy day,

when not only Irishmen, Englishmen, Scotchmen, and Americans shall treat each other as brethren, but when all men, however divided into nations, shall feel that they are the children of a common Father and Governor, and shall know that the same rules of reciprocal charity, forbearance, and good-will which he has imposed upon individuals he has likewise imposed upon nations.

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### ADVANTAGES OF AN INTERNATIONAL CODE.

Address before the American Social Science Association, October 29, 1869.

MR. PRESIDENT, LADIES, AND GENTLEMEN: At the annual meeting of the British Association for the Promotion of Social Science, held at Manchester in the autumn of 1866, a proposition was made for the appointment of a committee to prepare the outline of an International Code, to be submitted to a future meeting of the Association. The plan was to have this outline revised and filled up under the auspices of the Association, and thus to make the draught of a code as complete and perfect as possible, in the hope that the work thus made and sanctioned would not only carry with it the authority of its framers, but would so commend itself to governments and people that, through discussion and conference, it would finally be received and adopted as an authoritative guide and rule for nations and individuals in their international relations. The proposition was favorably received, and a committee was appointed, consisting of jurists of different countries. The work has been undertaken and considerable progress made, and another year, it is to be hoped, will see the outline completed and ready for submission to the Association.

Thinking that the subject will commend itself also to the attention of this kindred American Association, I venture to bring it before you on the present occasion. To no other people is international law more interesting and important than to Americans; by none have its harshest rules been more strenu-

ously resisted; and it is hardly too much to say that none have done more for its amelioration. What is an International Code as now proposed? Can it be made? What chance would there be of its adoption? And what good will it do if adopted? The answer to these questions will form the topics of this address.

What is an International Code? A code is a body of law, complete in itself, expressed in distinct propositions; condensed, classified, and arranged in scientific order. International law is that body of rules recognized among nations, defining their rights and duties toward each other, and the rights and duties of their people respectively, as growing out of international relations. An International Code is, therefore, nothing more nor less than a code of this law of nations. The law is vast in extent and infinite in detail. It encircles the earth, holds or assumes to hold the strongest nations in its grasp, and affects to a greater or less extent the relation of every human being. You may intrench yourself in camps and fortresses, yet its voice will reach you; you may take the wings of morning, but you can not escape its presence. Its office is to regulate the conduct of your own nation toward all other nations and all strangers; and to govern and protect you into whatever part of the world you go. No sovereign is so haughty, no subject so poor, as to be beyond its authority. It knows neither latitude nor longitude, wears the same face under northern and southern skies, and utters one voice to the Caucasian, the African, and the Mongolian.

It teaches the reciprocal relations of nations and of their people in peace and in war; the duties of a nation toward other nations and their individual members; and, reciprocally, the duties of the individual members of a nation toward other nations and their members.

If you ask what is the rightful jurisdiction of nations over the persons, property, and obligations of foreigners, what facts constitute domicile, and what is the effect of a change of domicile; what is truly the tie of allegiance and its limits, and the rights of expatriation and naturalization; what is meant by the equality of nations, and what are their relative rights in respect to extra-territorial action, as, for example, navigation, explora-



tion, discovery, colonization, fisheries; when and to what extent, and on what conditions one nation may insist upon trade or other intercourse with another nation or its people; how the intercourse of governments should be carried on, and by what agencies and under what immunities; what are the just rights of foreigners in respect to residence, occupation, religion, asylum, extradition, and the acquisition and transfer of property, and their duties in respect to taxation, civil and military service, and obedience generally to the laws of the country of residence—if you ask any or all of these questions, you will find the answer in an International Code. If you refer to those subjects which are variously treated under the titles of “Private International Law” and “Conflict of Laws,” and which rest partly upon usage and partly upon what is called the “comity of nations,” as, for example, the effect to be given in one country to the judgment of the Courts of another, the validity of foreign marriages and divorces, the rules of succession and the interpretation of foreign contracts, you will perceive that they, too, have their proper place in an International Code.

Passing from these subjects which relate to a condition of peace to those which relate to war and its consequences, you find that here, too, an International Code would instruct you how the war may be begun, and how it should be carried on; what persons may wage hostilities, and what they may do against the persons or property of armed or unarmed enemies; the immunities of hospitals, surgeons, and nurses; the punishment of spies, and the treatment and exchange of prisoners; the rights of non-combatants; the exemption of particular property, public or private, from capture or destruction, and the manner of disposing of that which may be captured on the sea or on the land; and then, after teaching the rights and duties of belligerents, it would teach also those of neutrals, and show how far they may under any circumstances intervene, whether by mediation or other action more direct, and in what trade or intercourse they may engage with either belligerent; and when at last the war is terminated, as all wars must terminate, in peace, and questions arise of restitution of permanent possession of captured territory or other property, it would dispose of these questions also.

The rules of international law which now prevail have various sources. Most of them have come from usage, some from treaties, and a few, perhaps, from the legislation of particular countries. They are not always consistent with each other; some are admitted and some disputed, and not a few are unreasonable and oppressive.

The present scheme contemplates the preparation of such a code as would be prepared by persons specially commissioned by the different governments to make the best code they could devise for nations and individuals in their international relations, with a view to lessen the evils of war, promote peace, facilitate intercourse, and bring about good-will among men, which should be the wish and aim of philanthropist and Christian.

This is but a rough sketch, and shows very imperfectly the full scope of an International Code as proposed, and the extent and variety of subjects with which it would have to deal.

Can such a code be framed; and, if framed, what are the chances of its receiving the sanction of governments or people? The first question is easily answered. There is no more difficulty in framing a code of international law than of national or, as it is sometimes, though inaccurately, called, municipal law. The established rules of international law have already a written record; they are contained in the treaties entered into between nations, in acts of legislation, in the decision of courts of law, and in treatises of publicists. All that is thus contained can be gathered together from its various repositories, condensed, analyzed, and arranged, and stated in distinct propositions. Indeed, the answer, so far as relates to existing law, has been already given by actual experiment.

When the proposition was first made, at the British Association, no code of international law had ever been attempted. Since then, however, a German publicist, Bluntschli, has, with great success, arranged the established rules of international law in the form of a code. As to the debatable questions, they must be solved, as they can be solved, by discussion, conference, and general assent of publicists, first, and the sanction of governments afterward. The ameliorations to be made must

be arrived at in the same way. If law be, as it has been pronounced, written reason as applied to the affairs of men, these advances which are required by the present development of international intercourse greater than the world ever saw before, and by our advanced stage of civilization, can be reasoned out and explained.

The answer to the question whether if rightly framed such a code would receive the sanction of governments or people, depends much upon the answer to the further question, What good will it do if adopted?—since it is to be presumed that, if the material interests of the world are sure to be promoted by it, its ultimate reception will take place. Let us, then, proceed to consider what good it would do.

Its first great office and advantage would be to inform governments and people of their international rights and duties. That information on these topics more general than now exists is extremely desirable, who will venture to deny? Three times at least within the last seven years our own Government has been on the verge of hostilities, or of most embarrassing complications upon questions of international law—twice with Great Britain and once with Spain; with the former in respect to the Trent and the Alabama, and with the latter in respect to Cuba.

It is not within the scope of this address to enter into a discussion of these cases, in order to arrive at a true solution of the questions they involve, but to point out how a better acquaintance on all sides with the rules of international law would have saved us their embarrassments. For it is as certain as any result can be, that, if the true rule had been clearly defined and understood, two kindred nations would not have run the risk of serious conflict, nor would there now be any ground of debate respecting our duties in regard to the insurrection in the chief island of the Antilles.

To know the law is the first step toward obeying it. There may indeed be knowledge without obedience, as there may be obedience or conformity without knowledge; but knowledge is essential to a rational sense of responsibility and a due exercise of it. To inform the conscience is as necessary as to incite it; the more popular the government the greater is the occa-

sion for this information. The public conscience is apt to be weakened in proportion as it is widened, and it is one of the disadvantages of popular governments that responsibility is so diffused as to lessen the weight of it upon the individual citizen. It is no uncommon thing for men to participate or acquiesce in acts of the community which individually they would scorn as derogatory to their honor and conscience; while, therefore, a knowledge of international claims and obligations is important to all governments, it is especially important to those which spring from the people and act as the organs of their will.

The second advantage of the proposed International Code will consist in the opportunity thus given for a general revision of international law. Such a revision has become indeed a necessity. I have already referred to the debatable questions. How many such there are the history of this country too plainly testifies. In its earliest years our diplomacy was burdened with never-ending disputes about the rights of neutrals. We had to contend with the preposterous claims of England as a belligerent, and the still more preposterous claims of France; with British Orders in Council, and the Berlin and Milan Decrees; with spoliations on the high-seas, and unfriendly harbors; with prize courts confiscating for each belligerent; with impressment of seamen, in the name of perpetual allegiance, and the confiscation of cargoes, in spite of the neutral ships which bore them and the neutral flag which covered them. We resisted these claims, and many of them have been abandoned; but the law has not been definitely settled, as it should be, by the concurrence of the civilized world. As nations have no common superior, there is no human lawgiver competent to make laws for them; whatever changes occur, must be made by common consent, and the most direct method of giving that consent is by treaty.

The Code proposed is an important, not to say indispensable, preliminary to such a treaty. The theory upon which the work is undertaken is, as I have already stated, that the jurists who prepare it shall make it as they would if they were commanded by the different governments to prepare the best that they could devise, having regard to what is already settled, to

what is disputed, and to what seems to be demanded by the wants of increasing commerce—the maintenance of peace, the instinct and spirit of human brotherhood, and the Christian civilization of the whole human race. When such a code is framed it will not be unreasonable to hope that a conference of representatives from different governments may be had, from which concurrent treaties will spring for its sanction and adoption. Joint or concurrent treaties are not new in the history of diplomacy. The treaties of Vienna, after the final overthrow of Napoleon, settled for a generation a considerable part of the public law of Europe. Congresses of the great powers have been often held since; and a general congress of nations for the revision of international law would be but a step, though a great step, in the same direction.

But the greatest of all the opportunities offered by an International Code will be that of amelioration. The domain of international law can be greatly and wisely extended. The ties which bind the nations together can be multiplied and strengthened. We have shown, by our example, how independent states can be brought together in the closest relations. Our Federal Constitution is, indeed, a sort of International Code binding together States which otherwise are sovereign. But without claiming that the federative system can be extended so far as to include all nations, or even those of Christendom, it is fairly to be claimed that it may be extended greatly beyond its present limits. Some European statesmen have even dreamed of a European confederation on the general plan of our own. Whether that is merely a pleasant dream, or something that may become true in the happier future, none of us can tell. But this we may say, with undoubting confidence, that a community of the nations, under the mild and beneficent rules of an International Code, guaranteed by treaties and enforced by the courts, is within the grasp of the present age.

Let us glance at some of the ameliorations which seem now to be possible. In doing so, I give merely my own views without speaking for any of my associates. We will begin with the questions of allegiance, expatriation, and naturalization. These are questions upon which our Government maintains

doctrines the very opposite of those maintained by most governments. The opposition is easily accounted for. Monarchical governments rest upon the theory of personal allegiance. "Once a subject, always a subject," is a feudal maxim, coeval with modern civilization, which it has been the instinct and pride of feudal sovereigns to maintain, not only at home, but in all colonial possessions. The accident of birth bound the sovereign and subject together by a chain which neither age, nor distance, nor altered circumstances, could break ; it stretched across the seas, and bound both hemispheres. But, when colonial dependence was broken, the feudal tie was broken with it. The subjects of ancient crowns became the citizens of new States, linked to them by an undivided obligation. Thus fell the dogma of perpetual allegiance. The new States invited new settlers, and these, of course, were to be protected in their settlements. When immigrants of different nationalities settled in the same new country, the absurdity of holding them bound to as many sovereigns as they had left was but the more glaring. It was easily to be foreseen that the question would finally become one of mere strength. And so it has happened. The moment this country became strong enough to maintain its claim against any other country whatever, that moment it was evident that the rights of expatriation from an old state and naturalization in a new one were to be thenceforth asserted, defended, and acknowledged. In this spirit the later treaties have spoken, some more and some less distinctly. Prussia admits the rights, with burdensome qualifications ; Great Britain more frankly and fully. It is time that the right of every person to leave at will his own country, and settle in another, with all its consequences of renunciation of allegiance in respect to the old, and assumption of it in respect to the new, were universally admitted. This, it can hardly be doubted, is one of the subjects which will receive a distinct and authoritative solution, whenever an International Code is established.

Another class of subjects of international concern, in respect to which an International Code may be expected to be of great advantage, is that which relates to uniformity in matters in which it would be profitable or convenient for different na-

tions. Our Federal Constitution proceeds upon this theory when it provides that Congress may "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." There are not a few subjects on which it would be for the convenience and profit of all nations that uniform regulations should be established. Among them are money, weights, measures, copyright, patent-right, time, longitude, sea-signals, and rules of navigation. There is no sufficient reason why there should not be a money standard uniform throughout the world. The loss and inconvenience of changing from dollars to pounds, from pounds to francs, from francs to florins or thalers, have been felt by traders and travelers the world over. Uniformity is possible and most desirable. So with weights and measures. Why should intercourse be hindered and commerce perplexed with endless changes in the designation of quantities? Science proffers a common standard. We throw away our opportunities and advantages when we refuse to agree with the people of another country upon that uniform system which would benefit us both. Already there are treaties between France, Italy, and Switzerland providing for a uniform system. These treaties can be extended, or treaties similar in character made, so as to embrace not two or three nations only, but all the nations of Christendom, which is but another form of saying that an International Code, established by treaties, can provide for these among other matters of universal concern.

Another subject for which an International Code might provide, though not specially important for this country, yet most important for Europe, is a general disarmament. Instances of treaties to a similar effect are found in our own with Great Britain, respecting armaments on the lakes; and between Russia, England, France, and Italy, respecting fortifications and armaments on the Black Sea. The principle of these treaties can be applied on a larger scale with evident advantage. What was accomplished after the Crimean War by four European powers can not be impossible for eight in a season of profound peace. This question concerns us only as we feel everything which concerns the great body of Christendom. But the relief to Europe which a general European disarmament would bring

is incalculable. There are now, it is computed, from three to five million men in the standing armies of that continent. These men are withdrawn from industrial pursuits, and are supported by the labors of those who remain. Society loses, therefore, not only all that those millions of soldiers would themselves produce if set to work, but all the labors of those other millions who are engaged in supporting them. The productive industry of the world is lessened as much as if a pestilence had swept from the earth the hosts of armed men whose tread shakes the soil of Europe, and the other hosts of toilers for their support. This is the material view of the question. But, if, beyond that, we look at the demoralization produced by these armies, scattered in fortifications and camps, we shall feel that no single measure which the ingenuity of statesmen could devise would do so much for the relief of Europe as a general disarmament.

Looking to the prevention of war as far as possible, I believe that some plan of arbitration can be devised to which governments should pledge themselves to conform, or offer to conform, before resorting to hostilities. There does not appear to be anything chimerical in such a scheme. Suppose that this country and England, in an earnest endeavor to secure perpetual peace between them, should appoint plenipotentiaries to devise the terms of a treaty by each Government, and should be bound to refer matters of dispute to the arbitrament of a friendly power, or to commissioners chosen by the two Governments before a declaration of war; would it not be possible to make such a treaty in terms acceptable to both nations? And what is possible between these two nations can not be impossible between more than two. In the progress of our own country toward "a more perfect union," it was provided by the Articles of Confederation that disputes between States should be determined by commissioners or judges selected by the disputants, or, if they failed to select, then by commissioners chosen in this manner: three to be named by Congress from each State, each disputant to be at liberty to strike off alternately one name till the number was reduced to thirteen; and from these thirteen Congress was to select not less than seven nor more than nine to judge the matter. By



some similar means many disputes between nations, which otherwise would lead to war, might be settled; and, though war might not always be prevented, its occurrence would be made less frequent.

In the conduct of war by the belligerents, as well as in its effect upon neutrals, there may be great ameliorations. For ever to be rejected with scorn is that maxim of mistaken policy which would make war as severe as possible with the view of preventing its occurrence or shortening its duration. If this were a true maxim, hostilities should be conducted with the barbarity of savages: "Burn and kill as much as you can, spare neither age nor sex, neither house nor temple," should be the commission to every commander. "Give their roofs to the flames, and their flesh to the eagles," should be the cry of the combatants as they desolated each other's homes. But this is to reverse the current of history, to make the sun go back on the dial. If anything has been learned in ages, it is to lessen both the occasions and the severities of war. The movement has been gradual and constant toward the confinement of its operations to the actual combatants and obliging them to treat each other with humanity. In this spirit I would have an International Code to be framed, and in this spirit it must be framed if it would command the sanction of the governments and people of Christendom. Keeping steadily in view the principle that war should be waged only against those who wage it; that private persons and private property should be placed as much as possible beyond its ravages, I would stipulate for the absolute immunity of private property, on land and sea, when not used in some way for the support of hostilities. Why should my house be burned by an invading army if it be used only for my own purposes? and is there any more reason why my ship crossing the seas should be devoted to destruction? It is easy to see that the maritime supremacy which England so long maintained made her adopt and enforce the policy of capturing and confiscating any vessel belonging to any member of the country with which she was at war, and it is time that this anomaly was removed from the public law of the world. In respect to persons also, the rules of warfare may be materially changed for the better. Move-

ments in that direction have been made lately with much success. The conferences at Geneva provided for the exemption of hospitals, surgeons, and nurses; and the late conference at St. Petersburg has led to a very general agreement not to use explosive material in musket-balls. We may go further and provide for the absolute immunity of all private persons, for all who are not engaged in the actual operations of war. The inhuman doctrine that a fortified place may, under any circumstances, be given up to murder and pillage, should be blotted out for ever. St. Sebastian should never have a parallel. A bombardment like that of Valparaiso should be accounted infamous, and the armed ships of every nation should be bound to prevent it, as they would prevent any act of piracy. Passing from belligerents to neutrals, we can readily see how much good can be done by circumscribing as much as possible the effects of war upon neutral transactions. The lists of articles contraband of war can be greatly reduced in the interests of commerce. The right of visitation and search can be defined and limited. The duty of neutrality can be explained and understood in a better sense than hitherto. If there were really any question about the Alabama or the Cuba, it is time that no opportunity should be left for such a question to arise hereafter.

These, ladies and gentlemen, are but examples of what it seems possible to accomplish by an International Code. I have endeavored to show that such a code can be prepared; that, if rightly prepared, it would gradually make its way to the acceptance of Christendom, and, through Christendom, the world; and that, if thus accepted, it would prove a benefit to the whole human family. How far I have succeeded it does not rest with me to know; but I will venture to ask you to join me in the hope that what is thus thought possible may prove in the end a reality, and that a scheme which promises so much good may, even in our days, come to pass.

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## PRESENTING THE INTERNATIONAL CODE.

Address before the British Social Science Association, at Norwich, in October, 1873.

SEVEN years ago, at the meeting of this Association, held at Manchester, it was my good fortune to propose the appointment of a committee to prepare the outlines of an International Code. The proposition was received with favor, and a committee was appointed, composed of jurists from different countries. In the distribution of the labor of preparing the outlines a portion was assigned to me, it being understood that the different members of the committee should first interchange what they had respectively prepared, and then meet for a general revision. This, however, was found to be difficult. The members lived at too great distances from each other for an easy interchange. Under this embarrassment I thought it more convenient for the other members of the committee, as well as myself, to undertake a draught of the whole work, hoping that the others would take the same course. The work thus undertaken by me has been completed after several years of labor, and I come now to lay it before my colleagues, and, with their permission, before the Association itself.

It should seem proper, therefore, for me to give you a brief account of the scope and contents of the work to which I thus venture to invite your attention. The importance of the subject no reflecting person can doubt. One has but to open his eyes upon what is passing before him to perceive the necessity and extent of public law. Whether he remains at home or goes abroad, whether he travels by sea or by land, this law is ever present with him. Let us suppose him to be at sea. Let us take for example the great ship, the City of Chester, in which the other day I crossed hither from the farther side of the Western Ocean. As this vast fabric of wood and iron, cordage and canvas, with its outspread wings and its heart of fire, swept on its triumphant way, scarcely moving to the right or to the left, for aught that wind or storm could do, I thought what an illustration it afforded of the public law of the world!

The ship was English, with an English crew. The passengers were members of various nationalities—English, American, German, French, Italian, and I know not how many more. The freight was destined to different ports of Europe. Observe, now, in what manner and by what standard the rights and duties of this mixed company of passengers, of master and mariners, and of the owners of the ship and cargo, were to be measured and judged. To avoid collision with other ships, precautions had to be taken by the display of lights at night, by signals in thick weather, and by steering a particular course when other ships appeared in sight, in conformity with the rules of navigation now adopted by maritime nations. On meeting other vessels we conversed with them in that common language of sea-signals which the mariners of every nation should learn. If a collision had occurred, the wrong-doer and the amount of wrong done would have been adjudged by the first Court of Admiralty to which the case should come, according to the general rules of maritime law. Had another ship, sailing in the same sea, fallen into peril and been rescued by us, salvage would have been awarded by the same Court and according to the same law. Had the vast and complex machinery by which we were impelled broken down, and in a disabled condition we had been driven upon the French coast, we should have fallen under the jurisdiction of the French courts, where our rights would have been adjudged, not so much according to French law as according to that law which is common both to France and England, to America and to all the world—the law of nations. If, to escape a sea peril, a portion of the cargo had been thrown overboard, the loss arising from the jettison should have been apportioned according to a rule of average common to all civilized nations, though unfortunately a common rule has not yet been agreed upon. Besides these questions, how many others might arise! Suppose a contract or a testament to be made during the voyage, by what law is it to be interpreted, or its validity determined? Suppose a contract between an Englishman and an Italian, and the same to be brought before a French court; or suppose a testament to be made by a German, according to the form used in Germany, and to be brought before an English court; where are

the rules to be found by which the questions are to be decided? We might imagine other questions, and many of them, in respect of collision, jettison, wreck, salvage, or personal violence, and ask ourselves how those questions would be solved by the courts of England, of France, or Belgium, or Holland, and we should see more clearly the importance of that law, which is not confined to one country or race, but is or should be common to all countries and all races.

From these illustrations in relation to a single vessel, out of thousands on the seas, it is easy to perceive how vast is the extent and how varied are the details of that public law which is designated variously as international law or the law of nations. In the outlines of that science which I have attempted will be found a scheme of classification, and an arrangement of subjects; not, perhaps, the best that can be made, but the best that I could make. The work is divided into two books, one relating to peace, the other to war; or, to speak more accurately, the first treats of the relations of nations and of their members toward each other, except as they are modified by a state of war; the second treats of the modifications in those relations produced by a state of war. The first book is further subdivided into two portions, one containing the rules respecting the relations of nations to each other and to the members of other nations; the second respecting the relations of the members of each nation to the members of other nations; the first being that which is commonly known as public international law; the second that which is known as private international law. Bearing these divisions in mind, let us glance at some of the more important provisions which they contain. Besides the regulations which are usually discussed in works of international law, there are many others which, though often mentioned in treaties, do not usually find a place in general treatises. Thus, after considering the essential rights of nations, such as their sovereignty, equality, perpetuity, territory, property, of their extra-territorial action in respect of navigation, discovery, exploration, and colonizations, of fisheries and piracy, of the intercourse of nations with each other by means of accredited agents, of international compacts, of asylum and extradition, of national character and jurisdiction, of domicile

and of the reciprocal duties of nations to foreigners, and of foreigners to the nation where they live, in respect of residence, occupation, religion, obedience to the laws, taxation, civil and military service, other provisions for mutual convenience are inserted, to the subjects of which I attach much importance. These relate to shipping, imposts, quarantine, railways, telegraphs, postal service, patents, trade-marks, copyrights, money, weights and measures, longitude and time, and sea-signals.

In respect to copyright, patent-right, and trade-marks, I would assert the right of the author, inventor, or first designer as one to be held sacred and maintained in all countries. Longitude I would compute everywhere, as do the English, from Greenwich, instead of taking it for the maps of one country from Paris, and for those of another from Washington. For weights and measures I would adopt the metric system of the French; and as for money I would have a uniform coinage of certain pieces of gold, which should pass current in every country, and thus save travelers and traders from the loss and embarrassment to which they are now subject.

Then comes that part of the Code which contains provisions intended for the preservation of peace. They would require, first, that there should be a simultaneous reduction of the enormous armaments which now weigh upon Europe; secondly, that, if any disagreement or cause of complaint should arise between nations, the one aggrieved should give formal notice to the other, specifying in detail the causes of complaint and the redress sought, and that this complaint should be formally answered within a certain period. If such a course had been pursued by France and Germany before the fatal declaration of July, 1870, we should probably have been spared the last Franco-German War. A provision somewhat similar has already been inserted in the treaties of the United States with Portugal, Bolivia, Guatemala, Peru, San Salvador, and New Granada. Thirdly, it is provided that, when the parties do not otherwise agree, they shall appoint five members of a Joint High Commission, who shall meet, discuss the differences, and endeavor to reconcile them. If the reconciliation thus sought fail, nevertheless, a high tribunal of arbitra-

tion is to be appointed in this manner—each nation joining in the Code transmitting to the parties in controversy the names of four persons, and from the list of these the parties concerned alternately striking off one after another, until the number is reduced to seven, which seven is to constitute the tribunal. Is there anything chimerical or impracticable in this? Let me refer you to the last great arbitration at Geneva for an answer to this question. Let me go further back and refer to the history of the American Confederation. We began with arbitration. When the independence of the colonies was declared, they formed articles of confederation, one feature of which was that disputes between the States should be decided by commissioners selected by the disputants, or, if they failed to select them, by commissioners chosen in this way: three to be named by Congress from each State, each disputant to be at liberty to strike off alternately one name till the number was reduced to thirteen, from which thirteen not more than nine, nor less than seven, as Congress might direct, were to be chosen by lot to constitute the commission. A more perfect system was afterward established under the present Constitution, which created a Supreme Court as the ultimate arbiter between contending States. Controversies between States have already been adjudged by this Court: one between Rhode Island and Massachusetts; one between Iowa and Missouri, in which the Court fixed the boundary between them, and enjoined each other from exercising jurisdiction beyond it. A suit was begun by New Jersey against New York respecting the boundary along the Hudson, which was finally compromised by the agreement of 1833, entered into between the two States, with the sanction of Congress. Suits have been brought by New York against Connecticut; by Alabama and Florida each against Georgia; and between Maryland and Virginia, and between New Jersey and Delaware.

Why could not the plan of arbitration be extended to Europe? This continent contains eighteen independent states, counting the little communities of San Marino, Monaco, and Andorra, and considering Sweden and Norway as one, and Germany as united, wanting only the Austrian provinces. Ten

only of these states exceed in wealth and population the richest and most populous States of the American Union. These ten are the United Kingdom of Great Britain and Ireland, France, Germany, Russia in Europe, Austria, Italy, Spain, Turkey in Europe, Sweden, with Norway, and Belgium. The five states of Holland, Portugal, Switzerland, Denmark, and Greece, are each less in population than New York. Even Belgium has only 400,000 more, and Sweden and Norway together have only about a million more than New York. There can hardly be a sufficient reason why Holland, Portugal, Switzerland, Denmark, and Greece, should not submit their differences to arbitration or to a permanent court, as well as New York and Pennsylvania. And, if these five European states should be made to do so, why not France and Germany? The only reason, if reason there be, is that France and Germany are more powerful, that they would not consent to compromise in any respect their freedom of action, and that in case of refusal they could not be coerced. To this it may be answered that the rights of France and Germany are not more sacred than those of Switzerland and Portugal; that the constraint upon their independence and freedom of action, by a voluntary compact to submit their differences to arbitrament or judgment, is not more derogatory to their true honor and is not more dangerous to their independence and freedom of action than to a smaller state. Of the two, if there be any difference in that respect, the weaker state is in greater danger than the stronger. The American system binds and coerces populous and opulent States, sovereign in everything except as they have limited their sovereignty by their own free-will, and for the advantage of their own people. New York has already nearly four millions and a half of inhabitants; Pennsylvania three millions and a half; and Ohio two and a half millions. When New York is as densely peopled as England and Wales, it will contain 16,000,000 inhabitants. But there are seventeen States larger than New York—Texas, California, Nebraska, Oregon, Minnesota, Kansas, Missouri, Nevada, Florida, Michigan, Illinois, Iowa, Wisconsin, Georgia, Arkansas, Alabama, and North Carolina—how much larger will appear when we place the 47,000 square miles of New York side



by side with the 247,000 of Texas, or the 189,000 of California.

If the population of Texas were ever to equal in density that of England and Wales, it would amount to 85,000,000, and that of California, under the like circumstances, to 65,000,000.

Americans are confident that their Constitution is strong enough to control their largest States, with all the population and resources of which their magnificent future gives them the promise. Measuring the future by the past, the next half-century will see some of the States as powerful as the larger European states; and, unless it be supposed that the American is more patient of control and more obedient to law than his European brother, it should seem to be no harder a problem how to bring European states to submit their differences to the arbitrament of reason and law than it is how to make American States do the same thing. Great Britain and Ireland have 80,000,000 people; France has 38,000,000; Germany, 39,000,000; Russia in Europe, 68,000,000; Austria, 35,000,000; Italy, 25,000,000; Spain, 16,000,000; Turkey in Europe, 5,000,000; Sweden and Norway, 5,897,000; and Belgium, 4,839,000. The ratio of increase in America is about thirty-five per cent. every ten years. This ratio will give America a population as large as the whole of Europe in a little over fifty years. At the present ratio of increase, New York will contain in 1880 more people than Belgium, and in 1890 more than Sweden and Norway. If Texas and California are not subdivided, the time will come when they will have a population as great as any European state, saving, perhaps, Russia. Texas, it is said, has as large a proportion of fertile land as Italy, and capable of sustaining, relatively, as great a population. Italy has 25,000,000 inhabitants; Texas, as densely peopled, would have 57,000,000, and California 43,000,000. There is, therefore, nothing in the size or strength or riches of European nations to prevent their entering into and being permanently bound by a compact to settle their disputes by arbitration.

I do not mean to say that every claim which one nation may make upon another should be submitted to arbitration.

There may be claims which no self-respecting nation would submit to any arbiter, such as those which touch its equality or independence. To put an extreme case: suppose Spain were to claim the sovereignty of Holland, pretending that it had not been lost by Philip II, or by any of his successors, I would not have Holland submit such a claim to the decision of any arbiter or of any human power. It is not difficult, I think, to draw the line between questions which may not and those which may be submitted, and it is the latter only which fall within the category of disputable and referable questions, according to my view of them.

After the provisions respecting the preservation of peace which I have mentioned, the Code proceeds to the subject of private international law, making uniform provisions respecting private rights and the administration of justice. Here are grouped together regulations concerning personal capacity, social condition, the validity and interpretation of contracts, the effect of foreign marriages and divorces, the devolution of property at death, the administration of justice, the procedure and evidence, as they apply to the persons and property of foreigners.

The second general division relates to war in its effect upon the rights and duties of belligerents, allies, and neutrals. In respect to belligerents, there are regulations respecting the commencement, the conduct, and the termination of war. The general design has been to confine war to persons in military service, and their operations against property to that which is public. Private war and public war upon private property are alike prohibited. The provisions of modern treaties forbidding the use of certain deadly weapons, and exempting hospital surgeons and nurses, are taken and extended. The bombardment of defenseless places is absolutely prohibited. The various chapters are entitled thus: Of those who may wage hostilities; against whom hostilities may be waged; the instruments and modes of hostilities; truce and armistice; medical and religious service; prisoners; hostilities against property; contraband of war; visitation, search, and capture; blockade; prize; and the effect of war upon the obligations of nations and their members, upon intercourse and the administration of justice. In respect of neutrals, the absolute right of a nation to remain

neutral while others are at war is asserted in the strongest terms. England has often acted upon this principle, and never with greater effect than with respect to Belgium during the last great war. What is neutrality? What may a neutral nation do, and what ought it to do, and what ought it not to do? These questions, and the three rules of the Treaty of Washington, are next considered.

This is, in brief, a sketch of the present attempt to aid in the formation of an International Code, suited to the civilization of these nations, and to the Christianity of this nineteenth century of the Christian era.

Since these outlines were prepared, two important steps have been taken toward the establishment of an International Code. One was a conference held at Ghent on the 8th of last September, where an institute of international law was founded. This institute has undertaken to treat of several important subjects during the next year, and to meet again in August, 1874, at Geneva, for future action. The subjects to be treated are: international arbitration; the three rules of the Treaty of Washington; and private international law. A committee of eight was also appointed to attend the forthcoming conference at Brussels. This conference, which will begin its session during the present week—on the 10th of October—had its origin in a meeting held in New York on the 15th of May, at which a resolution was passed that a meeting should be called for consultation upon the best method of preparing an International Code, and the most promising means of procuring its adoption. A committee of five was accordingly appointed, by whom the conference, which is to take place on the 10th of the month, has been called. We hope to see representatives there not only from America but from every nation of Europe. The plan proposed is, first, to consider the expediency of an International Code, and, if found expedient, how it should be prepared and proposed for adoption; and, next, the question of arbitration for the settlement of international disputes. In short, the object of the Brussels conference is to take the preliminary steps for the establishment of a code of the law of nations, containing, among its provisions, a scheme of international arbitration.

In this we shall have, I am sure, the sympathy of every lover of his race. Of all the calamities which afflict mankind, war is one of the greatest. I do not say that it is the greatest of all, for I think that national degradation and slavery, or general corruption and the reign of fraud, are evils greater even than those of war. An oppressed people may and must rise against its oppressors. A nation attacked may and must defend itself. He who would not fight to the death in defense of his family or his country is not fit for this world. But, in proportion as the defense is just, the attack is unjust. There would be no occasion for the rising of an oppressed people if there were no oppression, and no need of defensive war if there were not first an aggressive war. And, of course, in proportion as you diminish the aggression you diminish the defense. In other words, if there were no aggressive and unjust war, there would be no war of defense—that is to say, no war at all. I would not detract in the least from the merits of those great captains who, fighting for the rights of their countrymen, have earned renown; nor would I dispute that there is in war frequent occasion for, as there has often been a display of, high heroic virtues. But the great men who displayed these virtues have themselves deplored the occasion and the evils of the war which they had been obliged to wage. Our own Washington was not only first in war but first in peace, as he was first in the hearts of his countrymen; and it was the Duke of Wellington, if I remember right, who said that there was nothing worse than a battle gained except a battle lost.

I would not, indeed, discourage the cultivation of the heroic virtues or take away the opportunities of their exercise; but, assuredly, war is not the only school where they can be cultivated or exhibited. There will always be suffering enough in the world for the exercise of all the virtues. Does not the shipmaster who puts his ship about in a stormy sea at the signal of a shipwrecked brother, and stays by him through the dark and perilous night till the daylight comes, that he may save him at the risk of his own life—does not he exhibit as much heroism as any of those who fought at Waterloo? Did not the captain of the Northfleet, who the other day calmly accepted death that he might save women and children, exhibit as much

heroic virtue as any of the brave six hundred who charged at Balaklava? Was Howard less a hero than Marlborough? Would you not as soon deserve the eulogy which Burke pronounced upon the former, as the poem with which Addison celebrated the victory of the latter? Let him who would win renown through labor, endurance, and self-sacrifice, go abroad into the world and make war upon the wrong with which it is filled.

Excepting the national degradation or national corruption to which I have referred, I can conceive nothing so horrible as those bloody combats which have so often desolated the world. The spectacle of two nations arming themselves to the utmost, and doing all they can to destroy life and property, ravaging each other's fields, burning each other's villages, bombarding each other's cities, maiming and slaughtering each other's people—such a spectacle is insulting to God and sickening to man.

The demoralization which is the concomitant or the certain follower of war, the revulsions in trade, and the national debts increased, weighing down the industry of generations, are but so many "horrors upon horror's head" accumulated.

I am not sanguine enough to suppose that war is in our time to be put an end to altogether, but I do suppose that increased intercourse and the general progress of civilization have more and more inclined men to the ways of peace. The armor that now hangs useless in our baronial halls, the battlements that now serve for ornament in place of defense, the walls of cities once formidable but now converted into promenades, are so many witnesses of successive steps in the progress from continual war to frequent and long-enduring peace. I do suppose, further, that, by judicious international arrangements, the chances of war occurring may be lessened, and that when, unfortunately, it does occur its evils may be mitigated. Such is the aim of my co-workers and myself in our efforts for the amelioration and codification of the law of nations. Such has been the object of the imperfect work which I now place, with all its defects, in the library of this Association, the closing act of a task undertaken seven years ago, and now fulfilled.

## ADDRESSES BEFORE THE ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS.

### THE BRUSSELS CONFERENCE.

At the opening of the Brussels Conference in October, 1878, Mr. Field was chosen President, and delivered the following address in French :

**MONSIEUR LE PRÉSIDENT :** Au nom de mes collègues d'Amérique j'ai l'honneur d'adresser mes remerciements à M. le bourgmestre et aux autres représentants de la ville de Bruxelles, pour la cordiale réception qui nous est faite, et pour la courtoisie avec laquelle ils ont bien voulu mettre à notre disposition l'une des salles de cet hôtel de ville où se pressent tant de grands souvenirs.

C'est un honneur auquel nous sommes profondément sensibles que de nous voir ainsi reçus à bras ouverts par les autorités communales de cette belle et ancienne capitale.

Nous venons sans mandat, sans représentation officielle, mais nous venons comme citoyens d'un pays pour conférer avec des citoyens d'autres pays sur des questions d'intérêts communs et tendant à réaliser le bien-être de tous. Il convenait que nous nous réunissions ici en Belgique dans cet heureux pays de neutralité et de paix aujourd'hui après tant de siècles de guerre.

Vous montrez le spectacle d'un peuple libre et prospère, se gouvernant lui-même, sans être l'objet des molestations de ses voisins, et vivant en sécurité sous la garantie du droit public, tandis que les orages de la guerre ont éclaté de l'autre côté de vos frontières. Pendant longtemps, ce beau pays a été le champ de bataille de l'Europe. Nul ne respectait vos droits, tandis que des armées traversaient vos fertiles et pacifiques campagnes et vos cités industrielles. Maintenant, vous reposez dans le calme et la sécurité, ne menaçant personne et respectés de tous.

C'est le résultat de la sagesse de votre gouvernement, de

l'excellent esprit de la population et de la fidélité avec laquelle vous observez vous-mêmes et exigez des autres l'observation de traités qui constituent votre droit public.

Le but que nous poursuivons est de provoquer un système plus large et plus rationnel de traités se rapportant au droit public du monde entier pour le maintien de la justice et la consécration de la paix entre les nations.

Pour essayer d'atteindre ce noble but, un comité s'est formé dans l'union américaine à l'effet d'inviter des publicistes et des juristes habitués à porter la lumière sur de grandes et importantes questions dans les diverses contrées qu'ils habitent, à se réunir ici, pour déterminer la meilleure méthode de préparer un code international et les meilleures moyens de parvenir à le faire adopter.

C'est dans cette pensée que la présente conférence est réunie, à la suite des invitations adressées par le comité et que nous avons le plaisir de nous trouver au milieu d'hommes représentant si bien la science.

À ces hommes arrivés de tant de différents pays, avec tant de droits au respect et honorés de tant de distinctions ; à cette gracieuse partie de notre auditoire qui adresse d'avance à nos travaux une approbation qui nous encourage et, encore une fois, aux représentants de cette belle cité nous offrons l'expression de nos remerciements les plus sincères et de nos plus respectueux sentiments.

#### *Translation of the Address at Brussels.*

In the name of my colleagues from America, I have the honor of expressing my thanks, to the Mayor and the other representatives of the city of Brussels for the cordial reception which has been tendered us, and for the courtesy with which they have been so good as to place at our disposal one of the rooms of this edifice to which are attached so many and so great reminiscences. It is an honor of which we are profoundly sensible to find ourselves received thus with open arms by the municipal authorities of this beautiful and ancient capital.

We come unbidden, without official representation, but we come as citizens of one country, to confer with citizens

of other countries, on questions of common interest, tending to affect the welfare of all.

It was fitting that we should meet in Belgium, in this happy country defended by its neutrality and reposing in peace, after so many centuries of war.

You present the spectacle of a free and prosperous people, governing itself, without molestation from its neighbors, and living in safety under the guarantee of public law, while the storms of war have been raging on the other side of your frontier. For a long time this beautiful country was the battlefield of Europe. No one respected your rights, while armies were trampling upon your fertile and peaceful fields and your industrious cities. Now you repose in quiet and safety, threatening none, and respected by all.

This results from the wisdom of your government, the excellent spirit of your people, and the fidelity with which you yourselves observe, and require from others the observance of, the treaties which constitute your public law.

The end which we are pursuing is to establish a broader and better system of treaties, defining the public law of the whole world, for the maintenance of justice and the preservation of peace among the nations.

In the endeavor to attain this noble end, a committee was formed in America, for the purpose of inviting from different countries jurists and publicists whose studies at home had made them familiar with the great and important questions we are to consider, to assemble here that they might agree upon the best method of preparing an International Code, and the best means of effecting its adoption. It is in this view that the present Conference is assembled in response to invitations sent out by the committee, and that we have the pleasure of finding ourselves among men who represent science so well.

To these men, from so many different countries with so many claims to respect, and honored with so many distinctions; to that fair portion of our audience, which in advance bestows upon our labors an approbation that gives us all encouragement, and once again to the representatives of this beautiful city, we tender our most sincere thanks and our highest respects.



## THE GENEVA CONFERENCE.

Address by Mr. Field as President of the Association for the Reform and Codification of the Law of Nations, at Geneva, in September, 1874.

**MONSIEUR LE PRÉSIDENT :** Au nom de tous mes collègues comme au mien, je vous remercie sincèrement de la bienvenue que vous nous accordez, de la bienveillance que vous mêmes et le conseil que vous représentez nous avez apportée en mettant à notre disposition cette salle historique, et de l'honneur que vous nous avez fait d'assister à cette cérémonie d'installation.

L'Association internationale pour la réforme et la codification du droit des gens se relie à l'Institut de droit international par une résolution fondamentale adoptée à Bruxelles. Elle poursuit les mêmes buts par des voies un peu différentes, mais en conservant toujours envers lui les relations les plus cordiales et les plus agréables. Il y a beaucoup de personnes qui ne pouvaient pas devenir membres de l'Institut, mais qui, néanmoins, voudraient bien travailler aux mêmes résultats. Ils feront de leur mieux pour contribuer à l'établissement d'un code international qui contiendrait le principe de l'arbitrage pour le règlement des différends internationaux. Aussi y a-t-il des sujets qui n'entrent pas dans le code du droit international, dans le sens technique de ce mot, mais qui, cependant, devraient faire partie d'un traité général entre les nations, en d'autres termes d'un code international ; tels, par exemple, que l'uniformité dans les droits de la propriété intellectuelle, dans les monnaies, dans les poids et mesures, dans les arrangements postaux, et des sujets pareils.

Nous nous déclarons heureux de nous réunir dans la ville de Genève. Ce n'est pas de votre position dans cette vallée que je parle : entourée de montagnes—ces montagnes magnifiques qui se soulèvent en silence toutes blanches de neige, percevant le ciel ; ni de ce lac ravissant de beauté, ni de ce fleuve du Rhône, clair et bleu, s'élançant comme une flèche au travers la ville. C'est de vos institutions que je parle, de vos grands hommes, de votre histoire, institutions qui marient la liberté à l'ordre ; hommes qui ont fait du nom du Genève un synonyme de la science et du génie et miracle de l'histoire, ce maintien

pendant tant de siècles de votre liberté et de votre indépendance, au milieu des puissances les plus grandes et les plus ambitieuses. Cette histoire est due, non pas seulement à l'héroïsme patriotique de votre peuple, mais aussi à l'autorité du droit des gens, le droit public qui est plus puissant que les rois et les maréchaux. Il y a trois-quarts de siècle qu'un grand orateur de l'Angleterre, indiqua à son auditoire le spectacle merveilleux de Genève dans le passé, reposant en sécurité malgré les flots des armées de la France qui se déroulaient devant ses portes sur l'Italie. C'est ce droit public, ce droit des gens, que nous étudions, et dont nous cherchons à étendre le domaine jusqu'au moment qu'il embrassera le monde entier, protégeant et réglant à la fois les nations les plus faibles et les plus fortes.

*Translation of the Address at Geneva.*

MR. PRESIDENT: On behalf of my colleagues and myself, I thank you sincerely for this welcome, for the kindness of the Council of State in putting at our disposal this historic chamber, and for the honor you have done us in assisting in the ceremony of installation. The Association for the Reform and Codification of the Law of Nations is related to the Institute of International Law by a fundamental resolution adopted at Brussels. It seeks the same ends by means a little different, but always bearing relations toward the Institute the most cordial and agreeable. There are many persons who could not become members of the latter, who, nevertheless, desire to labor for the same results. Here they will exert themselves to promote the establishment of an International Code containing the principle of arbitration for the settlement of international disputes. There are, moreover, subjects which do not enter into international law technically so called, but which, nevertheless, would form part of a general treaty among nations—in other words, an International Code: for example, uniformity in the laws of intellectual property, in coinage, weights and measures, postal arrangements, and the like. We esteem ourselves happy that we meet in this city of Geneva. I do not speak of your situation in this valley, surrounded by these

mountains—these magnificent mountains which, white with snow, rise in silence, piercing the sky; nor of this lake, a marvel of beauty; nor of this river Rhône, so clear and so blue, flashing like an arrow through the city. But I speak of your institutions, of your great men, and of your history; institutions which unite liberty with order, men who have made the name of Geneva a synonym for science and genius, and that miracle of history, the maintenance through so many ages of your liberty and your independence, in the midst of powerful and ambitious nations. This history is due, not solely to the heroism of your people, but also to the authority of the law of nations, that public law of the world that is stronger than kings or marshals. Three quarters of a century ago a great orator of England pointed out to his audience the wonderful spectacle of Geneva, in former times reposing in security, though the King of France poured his armies into Italy beneath her gates. It is this public law, the law of nations, which we study and are seeking to extend, until it shall embrace the whole world, protecting and controlling at the same time the weakest and the strongest of the nations.

#### CONFERENCE AT THE HAGUE.

Address by Mr. Field as President of the Association for the Reform and Codification of the Law of Nations, at the Hague, September, 1875.

GENTLEMEN: In the name of the Association, I have to thank you from the bottom of my heart for this welcome and the courtesies of this reception. We come, not as Americans, not as Englishmen, not as Frenchmen, or Germans, or Russians, or Belgians, or Italians, or Spaniards, but as men, seeking to promote the good of the whole family of which we are brethren. And it seems to me that I can, at this moment, render no more acceptable service than by bringing before you in a narrow compass the history and aims of the Association.

The first Conference was, as you know, held at Brussels, in October, 1873. On the invitation of the International Code Committee, formed in America, some thirty persons assembled from different parts of Europe and America, while as many

more gave in their adhesion by letter. Its American origin will not, I trust, render the Association any the less acceptable in Europe, since it is in the natural course of things that the daughters should aid the mother, if they can. The Institute of International Law having been formed at Ghent, in September, 1873, and the general object of that being the cultivation of the law of nations, the first act of the Association was to define with precision its relations to the Institute. These were declared in substance to be that, while the Institute was to be regarded as an exclusively scientific body, the aim of which was to favor the progress of international law, formulate its general principles, and aid every serious effort at its gradual and progressive codification, the Association was a body composed not only of jurists, but also of statesmen, economists, and philanthropists, the aim of which was to favor the progress of international law in its practical application and in public opinion. The two institutions differ, then, in these two respects: their personal elements are different, the Association containing not merely jurists, but also statesmen, economists, and philanthropists; and their objects are different in this, that the Institute confines itself to the scientific portions of international law, while the Association takes into consideration everything which appears to it most favorable to the development of pacific relations between nations and the progress of international civilization. Perhaps the shortest expression of the distinction is that the Association, having a larger membership, has the advantage of bringing together a greater number of workers, while its scope is wider, inasmuch as its work embraces all relations whatever that can arise between nations and the members of nations. If the two institutions were merged in one, that would cause no saving of labor, for even then a section of the Association, composed entirely of jurists, would have to be constituted for the performance of the same duty which the Institute is now performing, while it might be difficult to bring into the Association all who are now in the Institute. Some scientific persons prefer to be associated only with scientific persons, and a purely scientific and exclusive body like the Institute attracts them; while another body, more numerous and more open, like the Association, might possibly

repel them, and the cause for which both institutions are striving might thereby lose the benefit of their concerted studies and coöperation.

Thus, for example, in the present year the Institute has been deliberating about the best expression of the three rules of the Treaty of Washington, while the Association has before it the question of copyright, and the propriety of establishing an international tribunal for the decision of questions growing out of collisions at sea.

In the Conference of 1873, the Association, besides defining its relations to the Institute, adopted two important resolutions: one, "That an International Code, defining with all possible precision the rights and duties of nations, and of their members, is eminently desirable, in the interests of peace, and good understanding, and common prosperity. Therefore, the Association is of opinion that nothing should be neglected in order to arrive at the preparation and adoption of such a code. The Conference reserves the question to what extent the codification should be purely scientific, and to what extent it should be adopted into treaties or conventions between sovereign states." The other resolution was as follows: "The Conference declares that it regards arbitration as a means essentially just, reasonable, and even obligatory upon nations for the termination of international differences which can not be regulated by negotiation. It abstains from affirming that in all cases without exception these means are applicable, but it believes that these exceptions are rare. It is of opinion that no difference should be considered insoluble, until after a complete exposition of these points of difference, a sufficient delay, and the exhaustion of all pacific means of accommodation." After settling its relations to the Institute and passing these two resolutions, the first Conference postponed to the second the details of a permanent organization.

The second Conference was held at Geneva in September, 1874. Then the permanent organization was effected, a constitution and by-laws were adopted, papers were read and discussed, subjects proposed for future action, and a definite plan of operations was agreed upon. Thus far the Association has traveled on the road marked out for it, and we meet now in

the country of Grotius, the asylum of so many exiles, and the birthplace of so many treaties, to take another step in the same direction. Let us survey the ground to see what more there is for us to do. The answer requires a consideration of the present state of international law, and of the possibility of making it plainer and better.

The scope of the law of nations is as wide as the world, and the subjects which it embraces as numerous and complex as the affairs of men. When we think of it as that body of rules by which nations and their members respectively are governed in their intercourse with each other, we perceive that it is as universal as that intercourse, however wide, that it affects all the relations of the people of one nation with the people of another, and that from its very nature it must be superior in authority to the municipal laws and domestic institutions of any single nation. There is no place in Christendom where one can escape from its authority, or be denied its protection—neither in cities where merchants most do congregate, nor in country villages, nor in rural homes. While we remain in our own country and deal with our own countrymen only, each of us need look no further for his rule of action than the laws and institutions of his own country. But when foreigners come among us, or we go abroad among them, they and we at once become subject to another law; while, as often as our country has a transaction with another, it must conform to the regulations established or recognized for the intercourse of nations. There may be disagreement about the nature and extent of the rules; one rule may be accepted by some of the nations, and another by others, but that there must be a rule of some sort nobody can deny. Force may prevail, as it has often prevailed, over law, but the law exists nevertheless. Many rules have been established by treaty, and more by usage. The treaties are as various as the nations that made them, and as different as the circumstances out of which they grew. Designated as laws, because they are respected by governments and enforced by courts, they are not laws in the sense of commands from sovereign power, inasmuch as nations have no common superior. Both of the great divisions of this system, whatever it may be called, the public and the private, that which concerns

the state (whether in its relations with other states or with individuals) and that which concerns private persons only, abound with unsettled questions. One not accustomed to consider the subject would be startled by a catalogue of them in the private division alone—questions respecting personal conditions and personal rights, contracts and property. One has but to look into any of the treatises on the conflict of laws, Story, for instance, or Wheaton, or Westlake, to discover a mass of disputed points and discordant views. Is one, who in America finds himself of age at twenty-one, to be deemed not of age when he goes into a country where the period of minority is extended to twenty-five? Is a marriage contracted in London between a Frenchman and a daughter of England valid always in France? Is a divorce pronounced in Edinburgh between two aliens valid, under all circumstances, in their own country? Is a will executed in St. Petersburg by an Italian sufficient to fix the devolution of property in Rome? These are mere examples of questions that rise up on every side in the domain of private international law. Peace and war, in their multitudinous relations, affecting every pursuit and all conditions of men—these are defined, treated, and regulated by that all-comprehending body of rules which spreads over all and encircles the world. Encircles the world, did I say? I must recall that expression, because it is even now matter of debate whether international law was made by, or cares for, any other than Christian states. More than three fourths of the human race, if not beyond the pale of public law, are yet excluded from some of its advantages. In the Ottoman dominions, in the Barbary States, in Egypt, in Eastern Africa, in the Persian Gulf, in Burmah, Siam, Cochin-China, China, and Japan, the governments are excluded from that jurisdiction over Americans and Europeans which all American and European governments claim and exercise over all persons within their dominions, native or foreign born, sojourners or strangers. This discrimination against the Mohammedan, the Hindoo, the Buddhist, and the Sintoo, or, if you please, against the countries they inhabit, is sometimes a grievous burden. Diplomatic intercourse with these Mohammedan and Eastern nations does not lessen the burden of the capitulations, or make the countries equal before

the law of nations. In private international law the difference between the Eastern and Western nations is no less. Who will say, after such examples, that the relations between the Occident and the Orient, and the subjection of both to the public law of the world, do not need better definition than they have ever yet received ?

These are not the only unsolved problems of international law. The proper regulation of neutral trade, the list of contraband of war, the greater or less extent of the just immunity of private property on land and sea, and the establishment of a common tribunal for the interpretation and application of admitted rules, are problems of the future. The contemplation of so vast a science and a consideration of the number of its unsettled problems should convince the most skeptical that, even if there were no other means than war of determining the disputes of nations, there would still remain an opportunity of doing infinite good, by lessening the number of the unsettled problems, and in that way limiting the chance of dispute. This consideration alone should lead the firmest unbeliever in the disposition of men for peace to do all he can toward lessening the opportunities for contention, by clearing up, as far as possible, all doubts on the subject of rights. And much more should he strive in that direction who thinks that there is a better way than war for the settlement of disputes. The object of this Association is thus threefold: first, to promote common efforts to the common good; second, to lessen the chances of dispute between nations by settling, beforehand, in an International Code, the rights and the duties of each; and, third, by providing a peaceful means of settling disputes when they unfortunately occur. The first object is promoted by every new postal treaty, every new regulation for railways or telegraphs across the borders of conterminous countries, by every international compact for the protection of literary property, and by every monetary convention. As to the second, it is with nations as with individuals, when each knows the rights belonging to each, the chances of contention are proportionately reduced; and, if, when contention arises, a plan can be agreed upon for deciding it by reason, in place of force, the chances of war will be reduced to a minimum.



This brings me to the other great problem, which this Association would help to solve, the settlement of national contentions by peaceful means. In Moore's "Diary" is an account of his visit to Sir Walter Scott, containing this passage: "Mentioned that the Duke of Wellington had once wept in speaking to him about Waterloo, saying that 'the next dreadful thing to a battle lost was a battle won.'" In my own country when the War of the Revolution was over, the people of the States set about forming a Constitution which among other things should "insure domestic tranquillity." Each State ratified it by a convention. In the Convention of New York, one of her greatest citizens, Chancellor Livingston, opened the debates with a speech which began with these words: "Ever since a pure and perfect religion has lent her mild lights to philosophy and extended her influence over the sentiments of men, it has been a received opinion that the happiness of nations, as well as of individuals, depends on peace and that intimate connection which mutual wants occasion. To establish this on the basis of a general union of nations has at various times employed the thoughts and attention of wise and virtuous men. It is said to have been the last great plan of the illustrious Henry IV of France, who was justly esteemed one of the wisest and best of princes."

Following this train of thought, I will ask you to turn with me for a few minutes from the sight of those armaments which weigh and oppress Europe, and from the thoughts of war, its sacrifices, its distresses, its bloody fields, its defeats, and its victories, to the thought of peace and the means by which peace is to be won, if won it may ever be. Though the year may be far off when war will be banished from the earth, yet that is no reason why we should not strive to lessen the chances of war's coming and its evils when it comes. It has not yet been found possible by the most perfect system of law and police to prevent crime among men, but no one for that cause would disband the peace officers of the country and abrogate its laws. If we can not prevent an unruly man from breaking the peace of his neighborhood, no more may we be able to prevent an unruly nation from breaking the peace of the world; yet, as, in the one case, society does endeavor to repress

its unruly member, so in the other it seems reasonable that nations should endeavor to discourage, if not to repress, such of their family as seek to disturb the peace of the rest. If we can not accomplish all that we would, we may accomplish something; if we can not prevent all wars, we may prevent some that would otherwise break out; and, if when war comes we can not prevent all the horrors which are its usual concomitants, we can perchance abate some portion of its savage ferocity. Should we succeed even so far as to prevent one war in a generation, we shall have rendered an invaluable service.

Closely related to this subject of war is the subject of disarmament. Here are both a question of peace and a question of finance, and, with some nations, almost a question of solvency. If our Association could help to bring about a reduction of armaments to one half even of their present proportions, it would earn the gratitude of the world. What relief would this measure bring to Europe! From three to five millions of able-bodied men withdrawn from productive industry, and at least as many more laboring to support them, could then be restored to the activity of the world. How, for example, would the eye of Italy brighten, if, instead of the hundreds of thousands of stalwart men always in harness, garrisoning her fortresses, or drilling in her camps, they could be thrown into the workshops or the fields, to heap up riches for themselves and their countrymen!

Of all flippant follies in which shallow heads and wicked hearts indulge, that is one of the silliest which affects to deride the efforts made to diminish or to humanize war. As well might these foolish people affect to deride the laws which aim to repress disorder and punish crime, or the resolute zeal of peace-loving citizens to put down the bully and the ruffian, who disturb the quiet of their homes. Until you erase from the prayer-book the petition, "Give peace in our time, O Lord," and from the Lord's Prayer, the words, "Thy kingdom come, thy will be done on earth as it is in heaven," you can not, without convicting yourselves of the grossest inconsistency, refrain from wishing well to all rational efforts for the prevention or mitigation of war.

What, then, are rational efforts? What means can be devised for preventing, as far as possible, the occurrence of war, and of diminishing its evils, when unhappily it occurs? Before mentioning these means, let me say that I do not count among them the denunciation of all war as unlawful and of all preparation for it as inexpedient. As I would defend myself when attacked, and prepare for such defense if I am greatly exposed, so I would have my country defend itself against aggression and be ever ready for the defense. The resistance of the Dutch provinces to the tyranny of Philip and Alva was as just as it was heroic. The war of the American Revolution was a just war on the part of the Americans. But for their resistance, the course of the world, so far as we can see, and as nearly all Englishmen as well as Americans now agree, would have been changed for the worse. But a war of defense is one thing; a war of aggression is another. If the latter were not waged, the former could not exist. And it is the means of preventing aggressive war that we are looking after. What are they?

They are just those means, so far as a just analogy will carry us, which society adopts to prevent private war—that is to say, duels and other breaches of the peace. Private quarrels arise partly from bad temper and partly from misapprehension of one's rights. Society seeks both to curb the temper and to define the rights. Nations must do much the same kind of offices toward each other that individuals in society do toward each other—make laws for the definition of their respective rights, and appoint impartial courts or arbiters to settle their disputes. In one respect only does this analogy fail. Nations have no common superior, to define their rights and exact conformity thereto. There are, however, other sanctions than those which come from a common superior, and such as to a great extent fill their place, and it is these which I am seeking now to explain.

Municipal or national law contains the rules of conduct for individuals; international law the rules of conduct for nations. The former proceeds from a sovereign lawgiver, able to command, the latter from sovereign parties pledging their faith. The difference between national and international law

consists chiefly in the difference of their sanctions: National law is founded on recorded custom and legislative enactments; international law on recorded custom and treaty stipulations. An international code is but an extended treaty. Such a code complete has never yet been adopted; but partial ones have been frequent. The Treaties of Westphalia and of Utrecht formed a partial code of international law; so did the Treaties of Vienna; every treaty of modern times is a contribution to the law of nations; the Treaty of Washington, with its definitions of mutual duties, was one. What we advocate is, in short, this, a treaty between nations, defining their respective rights and duties, with stipulations binding them to submit their differences to the arbitrament of judges, rather than the chances of the sword. Is there anything unreasonable or chimerical in this?

The most plausible objections that I have heard are these two: one, that there are points of difference about which nations will not agree; the other, that, even with respect to those on which they are willing now to agree, they will not bind themselves to a perpetual agreement. These objections amount to no more than this, that you shall not have a code unless it is perfect and permanent. But there are more points of agreement than of difference, and the former can be arranged in a treaty, and it is not necessary that any treaty should be indissoluble. Once made, covering those points on which nations can be brought to a present agreement, with a provision for the withdrawal of any party upon sufficient notice, the treaty will naturally gather to itself further stipulations, and its foundations will grow in strength and permanence.

We take courage from what has been already accomplished. The United States have made several treaties with foreign powers, stipulating for arbitration, in case differences should arise respecting their interpretation. Several such arbitrations have already taken place. Other differences between the United States and other nations have been determined by arbitration. Resolutions in favor of such a mode of settling international disputes were passed by the British House of Commons, in July, 1873. The Chamber of Deputies of Italy followed with a resolution of similar import. Then came the

Congress of the United States and afterward the Diet of Sweden and the representative Chambers of Holland and Belgium. Other representative bodies we hope will follow. The Alabama and San Juan arbitration between America and England, and the arbitration between England and Portugal, in which the President of the French Republic has just pronounced his award, are examples now before our eyes of the peaceful settlement by impartial arbiters of long-standing and vexatious disputes between nations.

Our Association contemplates no other than reason for obtaining assent to its views, and no other pressure upon governments than the influence of an enlightened public opinion. But we do desire to convince people and governments everywhere that their real interest and true glory are best promoted by peace and the cultivation of commerce and the arts; and to this end we would make them everywhere acquainted with the rights and duties of nations, that none may have reason for complaint or excuse for quarrels; and we would further convince them that the better way of settling disputes between nations is the same better way that has been already found of settling disputes between individuals.

Concert among the nations is necessary. One man might as well attempt to define the rights of all the race, as one nation to define the rights of others. It would be unwise, if it were possible, and it would not be possible, if it were never so wise. Preparatory to the concert of the nations, or rather preparatory to that unanimity of opinion throughout the world, which will lead to concert of the nations, is an agreement of individuals from different countries, meeting of their own motion, representing no government, and only intent upon influencing public opinion by the reasons which they adduce to the public judgment and conscience. Such an agreement it is the aim of our Association to produce. Every lover of his race must think well of our purpose, and if he does not give us his confidence, must give us, at the very least, his good wishes.

This brief recital closes the history of our first two years of associated effort. We dare to flatter ourselves that even thus much has not been in vain. The persons whom I see around me, these representatives from both sides of either ocean, this

fair audience, are witnesses that we have the coöperation and sympathy of thoughtful minds and loving hearts. Do not answer that war is the normal state of the world, or that it is the necessary outlet of pent-up passions, as the volcano is the outlet of subterranean fires, and point to history as the proof in its dismal recital of sieges and battles. We point to the sanctity of homes, the brotherhood of man, and the love and lessons of Christ, and we appeal from force to conscience, from the ordeal of arms to the arbitrament of reason, from the law of war to the better law of the golden rule, from the long line of the past to the longer line of the future ages.

#### THE FRANKFORT CONFERENCE.

Address by Mr. Field as President of the Association for the Reform and Codification of the Law of Nations, at Frankfort, in August, 1878.

**GENTLEMEN OF THE ASSOCIATION:** International relations are a necessity of modern society.

In the present condition of the world it is impossible for any nation to be entirely isolated from the rest. The governments of states must have some communication with one another, and the citizens of each must have intercourse with the citizens of others.

The relations thence arising have an importance commensurate with the interests they affect, and their cultivation concerns in some degree every citizen of every country on the globe, for, if he have no intercourse himself with another country, his government has, and his concern therein is proportionate to his concern in the acts of his government.

It is the aim of our Association to cultivate these relations. Ours is the only society which, so far as I know, has ever been organized for that object. Its name expresses its purpose. We address ourselves especially to the study of international relations: we seek to make them better known by embodying them in a code; and we suggest improvements, in other words, seek to reform them, so far as they appear to us to need reforming. If we are asked how we expect to succeed in these objects, seeing that we have no official authority, we answer

that we aim to influence public opinion, and we know that in our time public opinion controls governments. If we can impress our views upon the thinking men of this generation, we shall have accomplished our purpose, for we are sure that the rest will follow.

Bearing in mind, then, the greatness of the work we have in hand, and that everything which concerns the intercourse of one government with another government, or of the citizen of one state with the citizen of another state, is within its scope, let us review briefly the history of the Association, to see whether we have done anything toward the accomplishment of our task, and what claims we have to the confidence of our fellow-citizens in Europe and America.

The Association was founded at Brussels in 1873. It has held four annual conferences since—one at Geneva, one at the Hague, the third at Bremen, and the fourth at Antwerp. At these conferences, papers have been read, and discussions held, on the following, among other, subjects: the best way of settling international disputes without resort to arms, the establishment of international tribunals, the applicability of international law as understood in the West to the nations of the East, the exemption of private property from capture at sea, the extradition of criminals, the execution of judgments beyond the jurisdiction of the courts which pronounced them, the succor of shipwrecked mariners and the laws of copyright, of patents for inventions, trade-marks, bills of exchange, general average, bankruptcy, and collisions at sea. We have advanced, or sought to advance, step by step, in the study and development of rules for the government of all international relations. We have had the presence and assistance of many men distinguished for their knowledge of these subjects, and for their devotion to the good of their race.

The Antwerp Conference, after an exhaustive discussion, in which representatives from nearly all commercial countries participated, adopted a series of rules on general average, which have already received an approval so general as to be practically universal. Thus has been accomplished by common consent, without government intervention, a most useful and much-needed reform in private international law, and, if the

Association had done nothing else, and were now to go out of existence, it would deserve always to be held in honorable remembrance.

A report will be presented upon bills of exchange. Twenty-five rules have been already recommended, uniform for all commercial nations, which will remove many of the existing differences and anomalies, and other rules will be recommended in the forthcoming report. Of these twenty-five rules, twenty-one have been adopted by a commission acting for the three Scandinavian kingdoms, and twenty agree with the present German Commercial Code. They agree also in the main with the common law of England. We have reason to hope that the Governments of Germany, Austria, and Italy, are favorably disposed toward the scheme. It is hardly too much, then, to expect that the Scandinavian report will not only be adopted by Sweden, Denmark, and Norway, but will lead to a general treaty on the subject between the commercial countries of the world.

Kindred to this subject are those of a uniform coinage and of a uniform system of weights and measures. These subjects have been heretofore discussed in conferences of the Association, and we may reasonably expect that further progress will now be made. Two commissions, sitting in Paris, will this year report on monetary affairs, and, if the result of all these efforts should be the establishment of uniform systems for the measurement of commodities, distances, and values, a grievous burden will be taken from the shoulders of traders and travelers.

We are to receive among us, and shall welcome, the representatives of the two greatest Oriental nations, China and Japan, embracing together a third of the human race. They will present to us papers on a subject most interesting to them and already much discussed by us—the treaties commonly known as capitulations, by which foreigners among them are exempted from their jurisdiction. This, they insist, is a badge of supposed or implied inferiority, to which they ought not to be subjected. The subject is one of great interest, and should be carefully considered. Three different principles are to be applied, which, if care be not taken, may clash with each other :



the independence and the equality of nations, and the right and duty of each to look after the protection of its own citizens. A form of procedure and a mode of punishment may prevail in one country, which are abhorrent to the sense of justice of another, and the latter may therefore reasonably refuse to allow its citizens to be subjected to them. There must be, however, a mode of reconciling these different principles in their application to particular cases, and our Association is bound to do its utmost to find it.

The greatest present need of governments and peoples is the substitution of reason for force in the intercourse of nations. War and its concomitants, beginning with enormous and intolerable armaments and ending with waste, carnage, and unspeakable suffering, are the greatest of all calamities. If we can reduce their number or lessen their burden, we shall deserve well of the world. The time is propitious. Europe has just seen the most complicated of contentions settled by a Congress of Nations. As the Tribunal of Geneva was the most signal example of arbitration for the adjustment of disputes between states, so the Congress at Berlin has been the most conspicuous and successful example of an international Congress to avert impending war. There were settled questions, not merely of European, but of Asiatic interest—questions affecting not only Russia and Turkey, but England, Austria, and Greece as well, questions of supreme importance to the diverse population of vast provinces, while millions of armed men stood looking on, ready to spring into the arena, if the counsels of peace had not prevailed.

Let us never forget that the definition in solemn form of the rights of men and of nations and the amelioration of the rules which govern their intercourse tend, not only to establish justice, but to promote peace. This is the culmination of our hopes, the crown of the work to which we invite all lovers of the race.

We have to regret the loss, since the last Conference, of some of our most valued members : Count Sclopis, whose name will ever be associated with the Tribunal of Geneva ; Sir Edward Creasy, late Chief-Justice of Ceylon, scholar and jurist, who administered justice in the East and defended it in the

West ; Mr. J. V. L. Pruyn, Chancellor of the University of New York, whose whole heart was in our work ; Mr. Corr van der Maeren, of Brussels ; Mr. Leonard, late Judge of the Supreme Court of Louisiana ; Mr. Sjöström, of Bremen ; and Mr. de Pinto, of the Hague. They fell by the wayside, marching with us. Let us advance on the same road, and, cheered by their example, help to complete what they helped to begin.

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## APPLICABILITY OF INTERNATIONAL LAW TO ORIENTAL NATIONS.

Paper presented to the Institute of International Law at the Hague, in August, 1875.

At the last session of the Institute the following question was, on my motion, referred to a commission : "To what extent, and under what conditions, is the unwritten international law of Europe applicable to Eastern nations ?" During a recent voyage around the world I was led to observe the anomalous condition, with respect to international law, of all those parts of the globe which are not subject to Christian nations. We are not apt to reflect that what we call the law of nations is, after all, but a collection of rules which Christendom has made or sanctioned for its own people, and that the greater part of the earth is still outside of its authority. Not that it is wholly silent or unobserved beyond America and Europe ; I do not mean that. I have seen it appealed to in the correspondence between the Governments of China and Japan relating to the affairs of Formosa, and I know that books on international law are studied in both Japan and China, and that the treatise of Mr. Wheaton has been translated into Chinese.

Nevertheless, the international relations of the Governments and people of China and Japan, and not of them only, but of all non-Christian states, are very different from those which prevail among the states and people of Christendom. In Turkey and all its dependencies, as well in Europe as in Asia, in all of Africa except Liberia and the English and Dutch settle-

ments about the Cape, and in all of Asia except Siberia and Hindostan, the rules of international law, if they are recognized at all, are recognized with many exceptions and modifications.

Phillimore, speaking of Christians in infidel countries, says that "those persons who are entitled to extraterritorial privileges retain the domicile of their own country, with all the incidental rights affecting their persons or property." \* And again :

"When a person is admitted to extraterritorial privileges, the things that belong to him, and the persons that form part of his household or suite, are, generally speaking, sheltered under the same immunities.

"The privileges exempt them from liability to the civil or criminal tribunals. It is, however, possible that even privileged persons, by mixing themselves up with the trade or commerce of the country, or by becoming owners of immovable property therein, might of necessity be in some measure amenable to the civil tribunals.

"The privilege does not extend to real or immovable property. This, like the property of the native, is subject to the municipal law of the land."

The United States consular regulations of 1867 contain the following in respect to Mohammedan governments :

"It may be assumed, in regard to these, as a principle of the international law of the world, so far as there is any, that unless there be an express agreement to the contrary, no Christian nation admits a full reciprocity of municipal rights, as between itself and any state not Christian, and therefore, that in the Mohammedan governments above enumerated, Americans possess the rights of extraterritoriality which belong to all other Franks."

Among the published opinions of the Attorney-Generals of the United States is one on the functions of consuls,† in which are these passages :

"In our relations with nations out of the pale of Christendom we must and shall retain for our citizens and consuls, though we can not concede to theirs, the right of extraterritoriality. . . .

"When the countries now Mohammedan shall be subjugated to the doctrines of the Roman law, whether by the arms of Eastern or the arts of Western Europe, is of secondary moment to us, provided it be done ; and not until then can they be admitted to the same reciprocal community of

\* 1 Phillimore, "International Law," second edition, p. 398, citing Heffter.

† Vol. vii, pp. 348, 349.

private rights with us which prevails in Christian Europe and in America. Until that happens, Turkey and other Moslem states in Africa or Asia may, like China and Japan, enter into the sphere of our public law in the relation of government to government, but not in the relation of government to men. That full interchange of international right is admissible only among the nations which have unity of legal thought, in being governed by or constituted out of the once dissevered but since then partially reunited constituents of the Græco-Roman Empire."

In the case of *Mahoney vs. the United States*,\* the Supreme Court of the United States held that, upon Algiers becoming a French province, the functions of an American consul previously accredited to that country became *ipso facto* changed. And the Court observed that "the full reciprocity which by the general rule of international law prevails between Christian states in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian state and a Mohammedan state in the same circumstances."

In the dispatch of a former Minister of the United States to China, published by the American Government, this language was used :

"The states of Christendom are bound together by treaties which confer mutual rights and prescribe reciprocal obligations; they acknowledge the authority of certain maxims and usages received among them by common consent and called the law of nations, but which, not being fully acknowledged and observed by the Mohammedan and pagan States, which occupy the greater part of the globe, is in fact only the international law of Christendom."

In the treaty of 1844 between the United States and China, it was provided that questions between citizens of the United States in regard to rights, whether of property or person, should be subject to the jurisdiction and regulated by the authorities of their own government. A similar provision is contained in the treaty of 1858. And the Act of Congress of 1860, passed to carry into effect treaties with China, Japan, Siam, Persia, and other countries, provides that the jurisdiction of the consuls of the United States in those countries is to be exercised in conformity with the laws of the United States which

\* 10 Wallace, 62.

were thereby extended over all citizens of the United States, so far as such laws were suitable to carry said treaties into effect; and, when defective or unsuitable, the common law, including equity and admiralty, is to be extended in like manner over such citizens in the said countries; "and if defects still remain, to be supplied, and neither the common law, including equity and admiralty, nor the statutes of the United States furnish appropriate and suitable remedies, the ministers in the said countries respectively shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies."

Notwithstanding these and similar authorities, there are instances in which the local laws of Eastern countries have been applied to dealings between their people and citizens of the United States. Thus in the case of *Consequa vs. Fanning*\* Chancellor Kent decided that the Chinese law, in respect to the interest of money, should be taken as the rule of decision by our Courts.

As a general rule, however, it may be considered certain that the law of nations, as understood in Christendom, is not yet extended in its plenitude to the rest of the world. The reason is obvious. That law was first planted in Europe, and has been cultivated only in Europe and America. Its object is the intercourse and community of nations. The object of all people outside of Christendom has been conquest or isolation and non-intercourse. China shut herself up in fancied superiority; Japan, after admitting foreigners for a hundred years, excluded all but a few Dutch walled in and guarded at Nagasaki. Other Asiatic nations and tribes breathed the same spirit and pursued the same policy. In short, while the spirit of Christendom was brotherhood, the spirit of the rest of the world was seclusion or domination. When intercourse began, it was confined and partial, limited in place and limited in objects. Indian princes admitted a few trading factories; China allowed commerce only with the port of Canton, and then under numberless restrictions and impediments. Foreigners thus admitted must of necessity be kept apart, and the way to

\* 3 John, ch. 587.

keep them apart was to make them not only live by themselves, but take care of themselves, which meant that they must govern themselves. To have as little intercourse with them as possible was the policy of the native governments.

On the other hand, it was necessary for the protection of the foreigners that they should be kept out of the way of the natives as much as was possible. For these two reasons, foreigners formed separate communities, governing themselves; the natives, on their part, abstaining from intrusion so long as there was no attempt to pass beyond the limits assigned, and the foreigners, on their part, not going beyond them. Each foreign settlement thus become an *imperium in imperio*, the chief of the settlement being, in most cases, the consul of the country of the settlers.

The relations thus established were generally settled in treaties. There are many such. The United States alone, during the hundred years of their existence, have had more than thirty, reaching to nearly every organized state and many half-organized tribes; to Turkey, China, Japan, Persia, Siam, Madagascar, Borneo, Muscat, Loo-Choo, Morocco, Algiers, Tripoli, and Tunis. By these it is generally provided that American consuls shall have exclusive jurisdiction over civil disputes between American citizens. The treaties with Turkey, China, Japan, Siam, Morocco, Madagascar, and Borneo, give the consuls exclusive jurisdiction over crimes committed by Americans in the territories of the other; the treaties with Turkey, China, Persia, Siam, and Madagascar, give jurisdiction jointly to American consuls and officials of the other state over civil controversies between Americans and natives; the treaties with Japan give jurisdiction to the consular courts of claims of the Japanese against Americans, and to the Japanese courts of claims of Americans against Japanese; while the treaty with Borneo gives the consular courts exclusive jurisdiction of civil disputes between an American citizen and a Bornean subject.

This condition of things gives rise to many perplexing questions and creates no little embarrassment. I have heard the Khedive of Egypt complain, before the introduction of mixed courts lately accomplished, that he was unable to invite

foreign capital into his country as he would wish, because, in case of the non-fulfillment of their contracts by foreigners, he had no remedy but to proceed against them in the consular courts. One of the questions growing out of the present condition of things arose while I was at Shanghai. This settlement is built on one of the tributaries of the Yang-tse-kiang, and near the mouths of both rivers. The title to the soil, like that of all China, is in the Emperor, leases being given to the settlers. Besides these leases, the Government has made three grants, called respectively the American, English, and French concessions, the legal effect of which appears to be to give to the settlers, or rate-payers as they call themselves, the right of local administration, and to the respective consuls the right of jurisdiction, to be exercised, sometimes alone, and sometimes in conjunction with a Chinese mandarin sitting in what are called mixed courts. The question was this: Some American residents, citizens of different States, being about to borrow money of an English bank upon a mortgage of their real property in Shanghai, the execution of the mortgage by their wives was required. By what law was the point to be decided—by the law of China, or the law of England, or the laws of the American States, it so happening that in some of those States the wife had a right of dower, in others none? If the land had been situated in Russia, at the mouth of the Amoor, there could have been no question in the case, for the laws of Russia would alone have been consulted. What in principle should make a difference in this respect between land at the mouth of the Amoor and land at the mouth of the Yang-tse-kiang? Is it that one is in a Christian and the other in a non-Christian country, or that one is civilized and the other uncivilized? The former distinction is palpable, whether a just one or not; the latter depends upon the meaning of the word civilization. What is civilization, and in what respects is that part of Russia superior to China? No doubt the culture and manners of St. Petersburg are superior to those of Peking; but is Petropavlovsk better in its official establishment or in its administration than Shanghai? But if it were admitted that the administration of justice and the other functions of government are better performed in Siberia than in China, yet is the difference so

great that one is entitled to be pronounced civilized and the other uncivilized? Is not the difference one of degree only? Can it be justly claimed that a nation which has maintained a regularly administered government, over hundreds of millions of human beings, for thousands of years; which had invented gunpowder and printing before they were dreamed of in Europe; which had a cultivated literature and perfected arts, while yet our ancestors were clothed in skins and lived on uncooked food—can it, I repeat, be justly said of such a nation that it is uncivilized? It must be admitted, I think, that the point of civilization is not the one on which the question of international law, in its application to China, should turn. As to the other reason, that which depends upon the reception of Christianity, it can not be a reason why one nation should be excluded and another admitted into the brotherhood of nations.

The chief reason why international law has not been applied to these nations is, I conceive, historical. That law began in Europe, was applied to Europe, fashioned for it, before intercourse with Asiatic and African countries had grown into considerable proportions. There is, however, another reason besides the historical one. An envoy of the United States, writing to his Government, used this language:

"I entered China with the formed general conviction that the United States ought not to concede to any foreign government, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations—in a word, a Christian state. . . . In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire. . . . I deemed it, therefore, my duty to assert a similar exemption on behalf of citizens of the United States."

It was probably the intention of the envoy to convey the idea that the difference in rights arose not from the difference in religion, but from the difference in laws and social habits, such differences being in part due to other causes than religion. Whatever may be the minor discrepancies, there is a general similarity in the laws of the different American and European states outside of the Ottoman dominions, as every one can see who will take the trouble to compare the codes of the different



countries. But the divergence becomes wider when we pass into Asia. There, to mention no other peculiarities, the legal position of women and the laws of descent are fundamentally different.

What, then, should be our conclusion respecting the desirableness and practicability of extending international law in its plenitude over all the states and communities of the world? There is no difficulty in answering this question, so far as it respects all those portions of the laws of nations which concern the relations of nations to each other—that is to say, their essential rights of sovereignty, equality, perpetuity, territory, and property, their extra-territorial action, their intercourse and compacts with other nations, and their rights of asylum and duty of extradition. In respect to those portions of the laws of nations which concern the relations of nations to the persons and property of the members of other nations—that is to say, those which relate to national character, to domicile, to national jurisdiction, to the duties of a nation to foreigners and of foreigners to the nation—the first two are applicable to the Oriental nations, and the last three are also applicable, with modifications which will be afterward mentioned, and which may be more or less relaxed, as intercourse increases and assimilation goes on. Those regulations for mutual convenience, which form the subjects of so many modern treaties, are applicable to all nations, Western or Eastern, Christian or pagan, to a greater or less extent, commensurate with the extent of that intercourse, the convenience of which it is the object of such regulations to subserve. And all the provisions for the preservation of peace which are proper for the most advanced nations are none the less proper for the less advanced. All those regulations of international law which respect the carrying on of war are applicable to all nations alike, the most and the least enlightened.

Private international law, that which treats of the relations of the members of a nation to the members of other nations, and under which are grouped all international rules respecting personal capacity and relations, marriage, divorce, contracts, descent, and the administration of justice, is also applicable to Eastern no less than Western nations, except in respect to the

administration of justice. We have, then, these points of divergence, the jurisdiction of Oriental nations over travelers and traders from the West, and the administration of justice where such persons are concerned.

How shall they be dealt with? So long as the judicial institutions of Oriental states remain as they are, it is impossible to subject Americans and Europeans to their jurisdiction. No one accustomed to the judicial procedure of the West would ever willingly be subject to the procedure of the East. There torture is in constant use, oaths are rarely administered, advocates are unknown, and, instead of fixed rules of decision according to law, the caprice of the judge or a vague notion of justice controls the decision. I have myself seen accused persons brought up for trial before a Chinese judge. Each one was brought in with a chain around his neck, the end of which was fastened to a heavy stone that he was obliged to lift when he moved; on entering the judge's presence he sank upon his hands and feet and remained so during the trial, scarcely daring to look up; a crowd of retainers surrounded the judge and took part in the trial, interrupting him, suggesting questions and making statements; and, when the poor creature dared deny the charge, he was instantly put to the torture by men in waiting, who seemed as much part of the court as the judge himself. The punishments inflicted in all Oriental nations are strange and cruel, crucifixion being often among them. It would be revolting to subject our countrymen to such an ordeal and the chance of such a punishment.

It seems to me possible to obviate the difficulty by the establishment of mixed courts and a special procedure, for the disposition of the cases in which Americans and Europeans are parties. Approaches to such an arrangement have already been made. Mixed courts have been some time in existence at Shanghai and have worked well. The practice there is for a consul to sit with a native judge in cases against natives where a foreigner is interested, and for a native judge to sit with a consul in cases against a foreigner where a native is interested. These also I have witnessed, and I see not the slightest difficulty in their practical operation. The late treaty between the United States and Japan provides that the claims of Japan-

ese against Americans are to be prosecuted in the consular courts, while the claims of Americans against Japanese are to be prosecuted in the courts of Japan. Upon the whole, it appears that we have now arrived at a stage in the intercourse of nations, when a rule more liberal than that heretofore applied may be adopted by Christendom. It is for the interest of civilization and humanity that Eastern nations should be brought as soon as possible within the pale of international law.

So lately as June of the present year a step of great importance has been taken, by the establishment in Egypt of mixed courts, consisting of a court of appeal, in which there are six European judges and four natives, and of courts of first instance, held by natives and foreigners.

My own conclusions, in short, are these :

I. Oriental nations, or, to be more precise, non-Christian nations, should be admitted to all the rights and subjected to all the duties of the nations of the West, or, in other words, Christian nations, as such rights and duties are defined by international law, with the single exception—

II. That, until there is a greater assimilation between the nations of the East and the West with respect to judicial institutions, mixed courts and a special procedure should be established for the decision of all cases, public or private, in which Americans and Europeans are parties.

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## COLLISIONS AT SEA.

Paper presented to the Conference at the Hague, in September, 1875, on greater safety at sea, and international tribunals for questions of collision.

ON the 22d of November, 1873, the French steamer *Ville de Havre* was run into and sunk by the English sailing-ship *Lochearn*, off the coast of France. The catastrophe was horrible to relate; two hundred and twenty-six persons on board the steamer were drowned in a few moments. Official in-

quiries followed of course, but, strange to say, the French court of inquiry acquitted the officers of the steamer and laid the blame of the collision upon the sailing-ship, while on the other hand the English board of inquiry acquitted the sailer and laid the blame upon the steamer. Both inquiries were *ex parte*.

These occurrences have led the Association for the Reform and Codification of the Law of Nations to institute an inquiry, whether better means can not be found to secure the safety of travelers by sea, and to punish delinquencies.

In the present state of the arts of constructing and navigating ships, it may be laid down as a fundamental proposition that a loss at sea by collision or otherwise can hardly occur but through negligence. The problem is how to prevent this negligence. To prevent it, stricter rules must be prescribed, and adequate penalties inflicted for violating them. What should be these rules, and how should the violation of them be punishable? These are the questions to be answered, if we would have the navigation of the ocean safe. The purpose of this paper is to suggest certain rules tending to prevent losses at sea, and to urge the establishment of an international tribunal for the trial and punishment of delinquencies.

Among the rules which I venture to think should be established are the following :

I. Government inspection before and during the voyage. When it is objected, as it is sometimes, that individuals can take care of themselves, and that Government had better leave them alone, I answer, that the proposition is true only in those respects in which the individual has power to take care of himself. There are cases in which the collective power of the whole is better than the separate power of any individual, or of any number of individuals separately exerted, and this is one of them. The individual can not know beforehand what vessel is safely built, or safely equipped, or safely navigated. If he had the requisite knowledge, he has not the power of entering the ship-yards to inspect the building, nor the foundries to inspect the engines and boilers, nor the owner's office to examine the qualifications and records of the master, engineers, and mariners. His knowledge can only come after the event, when

it is too late ; the knowledge of the others comes beforehand, but only the power of the Government can reach it.

II. Increased responsibility. This may be enforced, by extending the limits of accountability and the presumptions of negligence. If I am correct in my theory, that, in the present state of the arts employed in building, equipping, and working ships, no loss can occur without negligence somewhere, there is good reason for declaring by law that such is the presumption, and the only question is how to fix or apportion the responsibility for the negligence. The builder is in the first instance responsible for the faulty construction of the ship, the iron-worker for the faulty construction of the engines and boilers, and the master, engineers, and mariners for the faulty navigation ; but a secondary responsibility attaches to the employer of the builder and iron-worker, and to the hirer of the ship's company, and this secondary responsibility centers in one person, the owner of the ship. He is the one most easily found, and he has given a pledge for his responsibility in the property of his vessel. For these reasons he should be presumed negligent, and held responsible for all losses until he excuses himself by proof that he had exercised the highest degree of diligence in respect to the employment of builders, iron-workers, and navigators. When he shows that, he shifts the burden of responsibility from himself upon some of the persons employed, and then they should be held to an accountability as strict as his would have been ; and for the reason that they are not so easily found, and have given no pledges for their fidelity, registration should be required of all concerned in the construction and equipment, and some security for their good conduct. As to the limits of responsibility, there appears to be no reason why the rule of law now established in many of our States, providing for the recovery by surviving relatives of damages for a wrongful death, should not be extended to losses at sea. If these suggestions should find favor, a disaster would be sure to bring unpleasant consequences upon those who had caused it.

III. More stringent rules of navigation. Those rules relate to the route to be sailed over, the speed to be allowed, the steering to be required in case of meeting another ship, the precautions against fire, ice, and gales, the signals to be made,

the observations, the reckoning, the approach to land, and the saving of life after the loss of the ship. On all these subjects, rules carefully prepared should be established, not by one nation for its own vessels, but by international agreement for all vessels, that every ship's company may have the same instructions and the same guides. Among other things, the rules should require the exercise in a rough wind at sea in the lowering of boats and the operations necessary to extinguish fire, the frequent heaving of the lead when within a certain number of miles from the land without seeing it, and the stoppage or very slow movement of the ship when the night or the fog is so thick that the lookout can not see a certain distance ahead. The distance seen and the speed should be made to correspond: little speed when little can be seen, and no speed at all when nothing can be seen, and the lead can not feel the land. What should we say if it were proposed to drive carriages at full speed through crowded streets, when they are so dark that nothing can be seen? Is it any less unreasonable, in a sea crowded with ships of a dark night or in a thick fog, to push on, risking everything upon the mere chance of there being nothing in the way? The time within which the ship can be stopped when moving with a given momentum is always known, and she should never be allowed to move with a greater velocity than such as would allow her to be stopped in half of the time required to move over the course between her and the outer circle of sight, so that, if two ships running in opposite directions were to come suddenly in sight of each other, they could both be stopped before meeting. Life-boats, life-preservers, and rafts of the best construction, should be on board in such abundance and so well provided that every person in the ship could be furnished with a life-preserver and taken on board a life-boat, with provisions, water, sailing and rowing equipments, sufficient to make the nearest land. The adoption of a system of sea-signals is a matter of the first importance. An international commission might be appointed to fix upon one for use in all sea-going ships, public or private. They would constitute a universal language to the extent of the communications possible from ship to ship at sea. Many kinds have been proposed; those having the largest use being the

Universal Code of Captain Marryat, the Code International of Captain Reynolds, the Commercial Code of the British Board of Trade, the Chronosemic Method of Mr. Greene, of the American Navy Department, and Costan's telegraphic night-signals, which last have been adopted by the Governments of the United States, France, Italy, Holland, and Denmark.

In all cases of collision, it should be an invariable rule that the colliding ships should stay by each other until the whole extent of the damage is ascertained and all the relief afforded by the least injured vessel which it is possible for it to afford. When the dreadful collision occurred in the Roads of Yokohama, between the *Oneida* and the *Bombay*, the loss of life would have been comparatively small if the *Bombay* had stopped, staid by, and assisted the company of the sinking ship.

IV. An international tribunal to decide questions arising out of collisions.

In case of shipwreck on the land, the country where it takes place and the country of the ship provide the proper authorities to decide questions arising out of the loss. But, in cases of the collision of ships of different nations on the high-seas, an international tribunal should be established to judge them. The collision between the *Ville de Havre* and the *Lochearn* and the resulting investigations are of themselves sufficient to prove the expediency and even the necessity of such a tribunal. How might it be constituted? I venture to suggest the following as a suitable arrangement.

The Court should be composed, if possible, of Admiralty Judges, because they are most conversant with questions of collision, and they are to be found already sitting in every maritime country.

Any one injured in person or property, and the personal representatives of any one killed, should be permitted to prosecute.

The prosecution should be civil or criminal, or both, at the option of the prosecutor, except that if a criminal prosecution is sought the prosecutor should be obliged first to obtain the sanction of his own government, and that prosecution should be carried on in the name of that government. The proceeding should be against the colliding ship and its cargo, one or both,

or against the owners of either or both, or the master, engineer, mariner, or other person by whose fault the collision occurred or the loss was sustained.

The prosecutor should be permitted to address his complaint to the Admiralty Judge of any country within which the colliding ship or its cargo, or the master, engineer, mariner, or other person complained of, might be found within a certain time after the collision. Upon receiving the complaint the Judge should issue a citation to appear at a reasonable time and place designated, should address a request to an Admiralty Judge of the country to which the person or property proceeded against belonged at the time of the collision, requesting the Judge addressed to sit with him, in person or by substitute, at the time and place so designated, to hear the case. It should then be the duty of the Judge addressed to comply with the request. The two Judges thus convened should hear and decide the case, with power to award the damages in civil cases and affix the punishment in criminal cases, such punishment to be fine not exceeding a certain amount, or imprisonment not exceeding a certain number of years, or both.

The decision might be executed at any place within the ordinary jurisdiction of either of the Judges, and in all other Courts and places should be held valid and conclusive.

This paper is, of course, to be regarded as a mere sketch, and is offered, by way of suggestion, to those who are seeking to provide sufficient safeguards against the dangers of the seas.

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## THE FRANCO-PRUSSIAN WAR AND THE LAW OF NATIONS.

Lecture delivered December 19, 1870, before the New York Association for the Advancement of Science, on the "Probable Changes in International Law consequent upon the Franco-Prussian War."

THE war which for the last six months has been raging in the heart of Europe came so suddenly upon the world, has proved so fearful in its devastation, and is likely to be so tremendous in its results, that the minds of men turn with intense interest to discover if there be not some means of preventing the recurrence of such a calamity. When the cannon saluted the morning of our last national anniversary, the world was in profound peace; before the Christmas-bells shall ring in the next anniversary of Christendom, France will have been trampled under foot by invading armies, her historic cities bombarded, and her fair fields made ghastly by innumerable fresh graves. A universal wail of women and children has gone up from the banks of the Seine and the Loire. Nor is the distress confined to France. While every French family is in desolation, every German family is in mourning. Is there no remedy for this? or, rather, is there no means of saving mankind from the like again? Eighteen hundred and seventy years have passed since Christ was born; Christian missionaries have traversed the earth; the temples of religion have risen on every side, and been crowded with worshipers; but war, nevertheless, has grown colossal; standing armies have increased beyond all precedent and out of all proportion to population; weapons are made deadlier than ever; and all the devilish enginery of battle and siege have become more destructive than any which history has ever before described. The effect of the present war is not confined to the two nations engaged in it. The whole of Christendom has suffered. Every European nation has increased its armaments. The war was declared on the 17th of July; within five days thereafter Switzerland had called out 40,000 men to protect her frontiers; by the 1st of August, England had made an extraordinary appro-

priation of £2,000,000, and she also ordered the enlistment of 20,000 additional men; Italy soon appropriated 40,000,000 francs; Belgium, by the 11th of August, had advanced its war credit nearly 18,000,000 francs; and Austria in like proportion. Even here in this country, apart as it wisely keeps itself from European complications, we have felt to some extent the agitation abroad; the cost of French and German products has been increased; our markets have been disturbed; and our social intercourse with the Old World seriously affected. Immediately on the declaration of the war, gold went up; that is, our currency depreciated about ten per cent. On the 9th of August there were laid up in the port of New York nine North-German steamers, and twenty-seven sailing-vessels; twenty in Boston, ten in Philadelphia, as many more in Baltimore, and others in all our principal seaports. There are, indeed, few spots on the earth where the influence of this great contention was not reached in some form affecting more or less industry and social relations. Can anything be done to save mankind from another like calamity? Is it possible to prevent a repetition of the accumulated horrors of the last six months? These are questions which present themselves to us every morning as we read the daily record of battle, of siege and sortie, of fire and famine. This war was sudden and wicked in its beginning, was bloody and ferocious in its whole progress, and will be full of awful memories and bitter humiliation in its close. Let us all, as we look on and deplore, tax our invention, that, perchance, we may suggest something to prevent or to hinder, and, if it can not be, then to mitigate the distress of war. We can contribute at least to the formation of a healthier and stronger public opinion. But public opinion, though it may do much, will not do all. The opinion of the whole world in last July would not have overborne the opinion of the French in their frenzy for an onslaught upon the Germans. Nations, like individuals, have their moments of excitements, when neither the good opinion of others, nor the lessons of experience, nor the dictates of prudence, can restrain them. Something stronger is needed; something in the nature of coercion must be applied; something that shall at least oblige nations to pause, to stay their hand till mutual explanation or

the mediation of friendly powers may be had. This something, whatever it may be, can come only from the general agreement of the nations, taking the form of international law. Believing that this contest has created an intense abhorrence of war altogether, and that the minds of men are firmly set to find some plan either to prevent another or to postpone its coming, or, if it occurs, to circumscribe and mitigate its evils, I venture upon some speculations in regard to the plans most probable to be adopted, and at the same time most promising of good. These relate, first, to the prevention of war; second, to the conduct of it when efforts to prevent it have failed; and, third, to the rights and duties of neutrals. Let me call your attention to them in their reverse order. First, as to the rights and duties of neutrals. The right of every nation not to engage in war is at least as clear as its right to engage in it. It may, therefore, without offense remain at all times absolutely neutral between belligerents; and the attempt of either by force or pressure of any kind, to make it take any part, however small, with one side or the other, is an attempt against its independence. This right of neutrality has, of course, a corresponding duty. A neutral nation is bound to refrain from assisting either belligerent. If it assists, it departs from its neutrality, is no longer a neutral, and becomes in some sort an ally. What, then, is assisting a belligerent? There are two kinds of assistance. Active assistance—that is, assistance by the Government itself—is plainly forbidden. Passive assistance is that which a government permits its citizens or subjects to render, or permits by not preventing them. How far a government is bound to go in repressing or preventing its members, who in their private capacities would render assistance, is a matter of great dispute. There are, then, two questions to answer: 1. What is forbidden to the members of a neutral nation? 2. What should the neutral nation itself do to enforce the prohibition upon its members? The present uncertainty of the law is illustrated by debates in the British Parliament since the breaking out of the war. To a question put in the House of Commons on the 21st of July whether it was intended to define what merchandise is contraband of war, and whether coal conveyed to non-blockaded ports would be

legal traffic, Mr. Gladstone replied that "it is not intended to define what merchandise is contraband of war. There are some articles which from their character are easily pronounced to be contraband of war, but there are others which, though of vital importance in carrying on belligerent operations, can only have their character defined by the circumstances of the case; that the prize court of the captor is the competent tribunal to decide whether *coal* is or is not contraband of war; and that it is impossible, as a neutral, to anticipate the result of such decision; but, having regard to the present state of naval armaments, *coal* may in many cases be rightly held to be contraband of war." To a question put in the House of Lords the next day, whether *horses* are contraband of war, Earl Granville said, after alluding to various authorities:

"From these authorities there is no doubt whatever that as to horses, coal, timber, sails, ropes, and various other articles, it depends entirely on the destination and a thousand circumstances which can not be defined beforehand whether they are to be held as contraband of war—a matter which can only be properly decided in the prize court of the captors. When we are not in immediate expectation of being engaged in war, we do not prohibit the exportation of such merchandise."

To a question put in the House of Commons on the 28th of July, whether a French or Prussian merchant-ship in a British port, if purchased by a British subject *bona fide*, and duly registered, would be exempt from liability to capture as being indisputably British property, the Attorney-General replied that—

"according to the decisions of the British and American courts such a vessel would be held exempt from capture; but the French have maintained that if the subject of a belligerent state possessed a vessel liable to capture he can not get rid of it by sale."

These debates serve to point out the uncertainty respecting contraband of war, and when to this is added the generally received doctrine that the only duty of a neutral government in respect to contraband trade, carried on by its citizens or subjects, with the exception of expeditions and ships fitted out from its ports, is to be passive and leave the trader to his risk of capture by the belligerent, it is manifest not only that the

application of the doctrine of neutrality to particular cases is most uncertain, but that the tendency to abuse of their discretion by prize courts is a constant source of danger to the peace of neutrals, and the means of drawing them into contention with the belligerents. Two theories have been maintained: one, that the list of contraband articles should be lessened because neutral nations are right in taking advantage of the stimulus to their trade which the wars of other nations create; the other, that the list should be enlarged, so that as little fuel as possible should be added to the flames of the contest. The former was the doctrine of the last century and the first part of the present; the latter has been gaining ground during the present half-century, and may almost be said to be the doctrine of to-day. The direction of public opinion and public law is now strongly in favor of holding aloof in every respect from the struggle, helping neither of the belligerents to anything which can contribute to their warlike resources. The latter should be the American doctrine. We condemn the Alabama as a pirate, and denounce the conduct of the English Government in allowing her to be fitted out and to escape as a violation of the neutrality of England. For my own part, I think the American claim in that respect well founded in morals and public law. In the light of morality, the selling of a ship-of-war to one of the belligerents for the purpose of warring upon the other is an offense more heinous, because of more consequence, than that of a gunsmith who should sell a pistol to a customer so that he might shoot his enemy before the door. Two changes in the law of neutrality appear to me necessary and impending: one, to define more clearly what is contraband, and enlarge the list; the other, to make governments responsible for their citizens or subjects, that they be kept from all contraband traffic. The list of contraband should include not only all instruments and munitions of war, but all articles necessary to the maintenance of armaments, such as coal intended for armed ships, and corn destined to the sustenance of armies in the field. Heretofore, as I have said, the theory of European governments appears to have been that their subjects may reap what advantages they can from foreign wars; they may sell and carry to the belligerents what they will, only they must

take care not to be caught. Then, practically, the injunction given them by their own governments is this: "Go forward, get all the gain you can out of the misfortunes of your neighbors, but remember that if you are taken we can not save you." That this doctrine will be changed soon, as one of the consequences of this war, I rejoice to believe.

Next, as to the conduct of war. The tendency of international law, following public opinion, has for several years been strongly in favor of confining it within narrower and still narrower limits. The point at which it will finally arrive is, I am persuaded, that wars shall be confined to actual combatants on land and sea; and that no private wars of any kind, and no wars on private persons or private property, shall be permitted. The result of this will be, first, to do away with privateering altogether. This has been already agreed to by parties to the Treaty of Paris in 1856. Our Government was invited to join in the declaration of this conference, but refused, through Mr. Marcy, because private property on the sea was not by the same authority rendered exempt from capture. I think this was a mistaken refusal; not because both objects were not desirable in themselves, but because it was better to make sure of a part, even though we could not get the whole. The whole, indeed, would not be long in coming. On the 9th of last July, Garnier-Pagès, in the Corps Législatif of France, brought forward the following bill:

"Considering that international law ought to suffer modifications with the progress of civilization; that the liberty of the seas is ever a paramount national right which no nation can justly restrict; that the great powers of Europe, in the Congress of April, 1856, have declared by a treaty, ratified by nearly all states, that privateering is and remains abolished; that states could not reserve to themselves a right of robbery which they so justly refused to their subjects; that private property, the basis of all society, ought, during war as during peace, and upon the sea as upon the land, to be respected by governments as by individuals; that the exchange of the products of industry and agriculture by means of commerce is a source of wealth to all nations, and that the most powerful and most productive are the most interested that exchange should be neither hindered nor injured; that a solidarity of peoples exists for the moral and material amelioration of humanity, and that one nation can not be impoverished without prejudice and suffering for the others—France declares the following additions to her maritime code: 1. Merchant-vessels are exempt from capture and

condemnation belonging to an enemy which, prior to the war, has accepted reciprocity in that respect. 2. The blockade or bombardment by ships-of-war of entrepôts or open or commercial cities of nations, accepting reciprocity, is forbidden, attack being limited to military ports and cities. 3. Special conventions for details shall be entered into with the nations which shall have accepted reciprocity. 4. Reciprocity shall be offered to all nations, and negotiations to that effect shall be opened with them."

This proposition was received with great applause, but it was lost sight of in the tremendous calamities that soon afterward fell upon France. The principles that I have been explaining will lead to the abandonment of certain practices in war, which now bring incalculable sufferings upon non-combatants. The bombardment of cities is an infernal practice which, it seems to me, nothing can justify. But what shall we say of that other practice, worthy only of fiends, which allows a besieging army to prohibit women and children from leaving a besieged town? We have all read with horror the story of half-starved women and children coming out of Metz, seeking to flee from fire and hunger, and yet turned back, that their agonies might torture the besieged into surrender! If this is true, not all the glory of German victories, of which this war has been fruitful, can ever counterbalance the disgrace of this awful barbarity. King William might return to his capital, to be crowned Emperor of Germany, and seated on the throne of Charlemagne, but all the music and clangor of his victorious legions, all the noise of the multitude of his people, would not drown the cries and lamentations of innocent fugitives at Metz, driven back to famine and slaughter. While these unnecessary atrocities of warfare have sullied the history of the present contest, there are other respects in which a very sensible amelioration has taken place. The convention of Geneva for the immunity of surgeons and nurses has been in the main honorably fulfilled. One more advance in that direction is needed, and that is the neutralization of the wounded. It should be deemed an inviolable rule of warfare that a wounded soldier no longer belongs to either belligerent, but should be treated as the member of a neutral nation would be treated. Yet it is reported as an event of the present war that the Belgian Government was obliged to refuse a passage home to Germany, through Bel-

gium, of wounded Germans, because the French Government declared that it would regard assent as a breach of neutrality; a refusal not more justified in the eye of reason and humanity than would have been the refusal to allow an invalid American or Englishman a passage through the same territory. It used to be a rule of international law that diplomatic intercourse ceased upon the declaration of hostilities. In the present instance, intercourse has been indirectly kept up, to a certain extent, through the legations of friendly nations. Our own Minister in Paris has had the satisfaction and honor of receiving under his protection thousands of Germans, for whom he has acted as if he were the representative of their own country. The English legation at Berlin took a similar charge of Frenchmen. In another sense, however, the movement has been retrograde. Multitudes of Germans of all classes have been expelled from France in contravention of right, and in disregard of the soundest policy; some of them persons who had long exercised trades in France, and even become domiciled there. The tendency of public law had been the other way, as many treaties of this country and others will testify. Thus, in the treaties between the United States and the Two Sicilies, Nicaragua, Paraguay, Bolivia, the Argentine Confederation, Costa Rica, Peru, and between France and Peru, Honduras, New Granada, the Hawaiian Islands, it is provided, in substance that, on the breaking out of war, members of one nation residing in the other shall have six or twelve months for leaving the country with their property, and many of these treaties further provide that such persons may remain during the whole war, if they conduct themselves properly. The principle of these treaties will, I am persuaded, soon become the law of the civilized world.

Now, as to the prevention of war. That war can be prevented altogether I will not undertake to affirm, but that it can be rendered less frequent, nay, that it can be rendered very unfrequent, I firmly believe. Peace, hereafter, and not war, as heretofore, can be made the normal state of man. The opening of the gates of the Temple of Janus may at least become the exception, and not the rule. Let us suppose it to have been enjoined by international law, last July, that, before



the French Emperor's declaration of war, a statement of his grievances should be sent to the Prussian Government, that he should then wait a certain number of days for an answer; that when the answer came it should be transmitted, with the complaint, to the other governments of Europe, and their friendly offices invited; and that he should still wait a certain number of days longer for their action. Supposing all this, it should seem to be scarcely possible that an accommodation should not have been effected before a resort to hostilities. Will it be said that such a provision can not be introduced into an International Code? I answer, let the attempt be made, and then we shall know whether it can succeed. The end certainly is worth the effort. Some approaches toward it have been made already. In several of our treaties with foreign powers, after providing against infringement by individuals, a stipulation of this sort exists:

"Should, unfortunately, any of the provisions contained in the present treaty be violated or infringed in any other manner whatever, it is expressly stipulated and agreed that neither of the contracting parties shall order or authorize any act of reprisal, nor declare nor make war against the other, on complaint of injuries or damages resulting therefrom, until the party considering itself aggrieved shall first have presented to the other a statement or representation of such injuries or damages, verified by competent proofs, and demanded redress and satisfaction, and the same shall have been either refused or unreasonably delayed." \*

There is really nothing in the size or strength or riches of European nations to prevent their entering into and being permanently bound by a compact which would make all their disputes to be settled by arbitration or judgment of a permanent tribunal. Are there any other reasons, independent of these, to prevent it? It is said, I know, that there are dynastic reasons against it. Sovereign houses, it is argued, will never consent to enter into any confederation or compact which will subject them in the least degree to alien control. But we have just seen the sovereign houses of Bavaria, Würtemberg, and Baden, enter into the new confederation which renders Germany one, and subjects them all

\* Here follows an argument for arbitration similar to that on pp. 419-422.

in certain limited respects to the control of a central authority. And, if we had not these examples before us, we might confidently trust that the real interests of nations will not for ever be postponed to the interests of their princes. Then it is said that the European nations are of different races, and homogeneous populations are necessary to the success of a confederation. To this it may be answered, first, that in this country such an objection does not appear to have much weight, since we are constantly talking of the annexation of Cuba, San Domingo, and even of Mexico, without pausing to think of the incongruity of races and tastes and modes of life between their inhabitants and ours. But a better reason is, that the question, after all, is one of a common interest, not of a common race. So long as the compact or confederation is limited to a few subjects, and these of common concern—be they merely the settlement of disputes between the sovereign constituents—the impediment can not be great which would arise from their differing interests. If a compact were composed, which should in any respect subject the police of London to the interference of St. Petersburg, or place the general body of English law under the control of Prussian lawgivers, the proposal would of course be rejected; but if the compact were limited to the settlement of differences between the two countries or to other matters of common concern, I do not see any impediment or difficulty in the case. At the time of the Paris Exposition, in 1867, commissioners were present from all the countries of Europe, and I am told by those who were present at their meetings that no difficulty was found in debating or deciding questions of common interest. Look for a moment at the advantages of such a compact or confederation, even if it were limited to the single subject of settling international disputes without resort to arms. See Europe without a formal compact, and then see America with one. The population of Europe is about 290,000,000, and that of the United States of America about 39,000,000. The peace establishment of Europe is at least 30,000,000; ours is now 37,350, and by the 1st of July next will be reduced to the legal standard of 30,000, exclusive of from 7,000 to 9,000 in the navy, officers and men. Our States are by our Constitution forbidden, with-

out the consent of Congress, "to keep troops or ships-of-war in time of peace." In Europe every state is filled with troops in time of peace. Even the eight smallest states, those which can hardly under any circumstances contemplate aggressive war, are obliged by the enormous armaments of their neighbors to keep on foot standing armies, amounting in the aggregate to 388,868 men, not including militia or reserves. Our peace establishment is one man to a thousand persons; theirs is one to less than a hundred. Without our Federal compact, we should have standing armies on the scale of the European; they by a federal compact, however limited, if it but contain a provision for deciding disputes by argument and reason, and prohibiting the keeping of troops and ships-of-war in time of peace, without a common consent, can reduce their peace establishment to the same scale as ours; leaving the maintenance of order and the execution of the laws in the several states to the civil authority and the citizen soldiery, the militia of the people. But I have already wearied your patience, and must close. As I said at the beginning, the minds of men are now set to discover the means of averting, lessening, or mitigating war. It has been my purpose, not only to show this tendency, but to indicate what seems to me the inevitable results. It is a part of the glory of this country that, in its first treaty with Prussia, negotiated between Franklin and the Ministers of the Great Frederick, are the following stipulations:

"ARTICLE XXIII. If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects, without molestation or hindrance. All women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the general subsistence and benefit of man, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burned or otherwise destroyed, nor their fields wasted by the armed force of the enemy into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessities, conveniences, and comforts of

human life more easy to be obtained and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading-vessels or interrupt such commerce.

"ARTICLE XXIV. And to prevent the destruction of prisoners of war by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other and to the world that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East Indies or any other part of Asia or Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality, as are allowed by them, either in kind or in commutation, to officers of equal rank in their own army, and all others shall be daily furnished by them with such rations as they allow to a common soldier in their own service, the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; and the said accounts shall not be mingled with or set off against any others, nor the balances due on them be withheld as a satisfaction or reprisal for any other article or for any other cause, real or pretended, whatever; that each party shall be allowed to keep a commissary of prisoners of their own appointment with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his report in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment after they shall have been designated to him, such individual officer or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared that neither the pretense that now dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged article in the law of nature or nations."

Franklin and Frederick! If one were not the greatest discoverer and philosopher, and the other the greatest captain and lawgiver of his age, these stipulations of the treaty made in the interests of the human race and standing as a model for all time, would assure their immortal fame. Since their day society has passed through many revolutions; power and law have oscillated between liberty and despotism, till now—after the greatest war which the countrymen of Franklin have ever known; and that other greatest, which the countrymen of Frederick are now passing through—we seem to have been brought to a period when these principles of that famous treaty may be ingrafted upon the general law of the world. Nay, more: Prussia has taught mankind how the American principle of federation may be applied to Europe. This should seem to be the opportune moment for great and most beneficent changes in the law of nations. If, seizing this great opportunity when the hearts of men are fixed upon setting bounds to dynastic ambition and reposing restraint upon warlike passions, this country, always recommending federation by its example, would take the initiative in proposing arbitration for its own dispute with England and a general amendment of the International Code, in the interests of peace and commerce and civilization, how she would entitle herself to the praise and gratitude of coming generations! What could so redound to the glory of an administration as to have been the instrument of such a consummation? Let us hope that overruling Providence, “from seeming evil still educing good,” will bring out of this fiery trial of the nations a new public law suited to that new time when it shall be truly said that—

“Sovereign Law—the state’s collected will—  
O’er thrones and globes elate,  
Sits empress, crowning good, repressing ill!”

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## AMERICAN CONTRIBUTIONS TO INTERNATIONAL LAW.

Paper read before the International Code Committee, at Philadelphia, September 29, 1876, in the Judges' pavilion on the grounds of the Centennial Exposition.

THE International Code Committee was instituted in America in 1873, with the view of promoting the reform and codification of the law of nations. Its first step was to procure the formation at Brussels, in the following October, of the International Association for that object. Two annual conferences of that Association have since been held—one at Geneva in 1874, and another at the Hague in 1875—and a third commenced its session at Bremen, four days ago. Meantime the American committee, in pursuit of the common object, and in accord with the Association, meets on this ground, out of sympathy with the centennial celebration, which has brought together here so many products of the earth, and so many representatives of its inhabitants. Everything about us is international. Within these walls, man is not so much American or English; French or German, as he is member of the human family, and brother of all those who bear the human form, and stand clothed with the divine attributes of speech and conscience. There is, indeed, contention, but it is the friendly contention of generous hearts, striving to excel in that which helps to comfort and exalt the human race. And all lands have brought their contributions to this great festival of the nations.

But how has it come to pass that, while in former times the great rivalry was of arms, there is now this rivalry of arts? It is because "mountains interposed make enemies of nations" no longer; because the missionary and the merchant, the traveler and the trader, have overleaped the barriers that divided them; because intercourse has increased, and men have thus come to know each other better; and, lastly, because the public law of the world has grown more genial as it has grown more powerful, and has gathered within its folds all the children of men.

It should seem fitting, therefore, that here, in the midst of

this international display, we should turn our attention for a little while to the progress of that public law which is common to all the representatives of so many lands, and which, however their own national or municipal laws may differ, speaks to them all with the same promises and the same commands, which binds nations no less than persons, and which aims ever to promote international fellowship and peace. And, inasmuch as this is the place and season of friendly contention and conference, when all bring their several contributions to the common treasure, it will hardly be thought unbecoming if the American committee take this occasion to show how far their country has contributed, in the first century of its existence, to the improvement of this public law of the world. I do not mean to speak of the contributions made by publicists, but of those made by acts of Government alone.

The hundred years upon which we look back have been fruitful of changes. Man's dominion over the forces of Nature has been increased a hundred-fold. Islands and continents have been newly peopled. Dynasties have been overthrown and other dynasties have taken their places. Old states have disappeared and new states have arisen. It would be strange if, with all these changes, there had been none in the law of nations.

There have been, indeed, so many changes that it would be difficult to enumerate them within the compass of one discourse. Some have grown by gradual and imperceptible accretion; others from political convulsions or conquests; and yet others from the studies of publicists and the treaties of governments. Some of them would not be observed without a minute comparison of the old law with the new; others came with observation, and are conspicuous in every book relating to the subject.

The history of international law since July 4, 1776, shows that, notwithstanding the prevalence of almost universal war during the last quarter of the past century and the first fifteen years of the present, there has been, taking these hundred years together, a general tendency of the nations to approach each other more closely, to avoid war as much as possible, and to diminish its severity when it occurs.

This tendency is observable, not only in the discussions of jurists, but in negotiations and treaties; in the extension, limited and qualified it is true, but still extension of international law to the Oriental nations, and among the Western nations its increased liberality and comprehensiveness, embracing continually new subjects and providing for new conditions.

Having regard to the two great divisions of the law, that which relates to peace and that which relates to war, we find in the former the right of intercourse between nations and the members of nations more widely extended and more firmly maintained; the rights of foreigners insisted on and defended in respect to travel, residence, commerce, worship, and all those private advantages, upon which the comfort and happiness of men depend; the social rights of the stranger and sojourner made so often equal to those of the resident native; the enlargement of the privilege of trade in general, with the simultaneous abandonment of the trade in slaves; the opening to general commerce of great inland seas, as the Baltic and the Euxine; the opening of conterminous rivers to the navigation of adjacent inhabitants, as the St. Lawrence, the Rhine, and the Danube; the right of expatriation and naturalization, and the duty of extradition; and the ever-increasing tendency to common systems of postal correspondence, copyright, patents, trade-marks, money, weights, measures, and the regulation of conterminous railways and telegraphs by land and sea.

In respect to war, we observe, as I have said, a tendency to lessen the chances of its coming, and to mitigate its severity when it comes. Resort to arbitration for the settlement of international disputes is a means of prevention not infrequently employed, much spoken of, and much commended.

In the conduct of war, men are more and more induced to diminish its extent, by confining its operations to armed forces, and forbidding attacks upon peaceful inhabitants, by restricting the rights of belligerents and extending the rights of neutrals; by abandoning or limiting the right of visit and search on the sea; by agreeing to the neutrality of goods in neutral ships, and the neutrality of isthmus routes; by abolishing privateering and exempting private property from capture at sea; by limiting the right of blockade, and enumerating and diminishing the list of



articles contraband of war. In short, the unmistakable drift of the public sentiment of the world is to make war a contest of arms between the armed men of belligerent nations, instead of holding every member of one nation the mortal enemy of every member of the other, and, while thus restricting the belligerents, at the same time to keep neutrals apart from the contest.

Having thus remarked the advances that have been made in international law during the century, we are prepared to consider the part which our countrymen have borne in making them. Within three months after the Declaration of Independence, that is, on the 17th of September, 1776, "Congress" (I quote from the secret journal) "took into consideration the plan of treaties to be proposed to foreign nations," and agreed upon the one to be offered to France. One of the articles stipulated for the abandonment of the "*droit d'aubains*"; another for equal commercial privileges to Americans and Frenchmen in each other's ports; another, defining contraband of war and prescribing the treatment of ships transporting it; another, protecting the subjects of each in the dominions of the other, on the breaking out of war between them; another, for the freedom of neutral trade and the conveyance of enemy's property in neutral ships, according to the maxim of "free ships, free goods"; another, respecting letters of marque; and another, respecting the visit of neutral ships in time of war.

A treaty of amity and commerce, modeled upon this plan, was made with the French King, in February, 1778.

Our treaty with the Netherlands, in 1782, stipulated for liberty of worship to the citizens of each in the other's dominions; for equal right to dispose of property; and guaranteed to each the privileges accorded by the other to the nation most favored.

The treaty negotiated by Franklin and his colleagues with Frederick of Prussia, in 1783, stipulated for reciprocity of privileges to the citizens of each in the ports of the other; for giving to each all the privileges accorded by the other to the nation most favored; for liberty of commerce and of conscience; for exempting contraband of war from confiscation, and subjecting it to detention only; and, finally, in order to

mitigate the distress of war, agreed upon the two following articles: \*

The treaty with Great Britain in 1794, commonly known as Jay's treaty, provided for extradition in cases of murder and forgery; declared that, in the event of war, there should be no confiscation of private debts, and the subjects of each might remain in the dominions of the other unmolested; that vessels approaching blockaded ports should be warned off before capture; that previous claims of the subjects of each against the other should be settled by arbitration; and that, if either party felt aggrieved for any injury, notice of the cause of complaint should be given before resort to reprisal.

It is thus shown that, before the republic had seen a score of years, it had stipulated for most of the reforms in which we now rejoice; and that, in the treaty with Frederick, not only had it gone beyond all former law in the effort to lessen the evils of war, but so far, that the public law of our own age has not yet overtaken some of its provisions.

During the present century we have insisted upon and maintained the right of intercourse, in our negotiations and treaties with Japan; the right to navigate conterminous rivers, in our demand for the free navigation of the St. Lawrence; denounced the slave-trade, in the Treaty of Ghent; protested against the payment of sound-dues for entrance into the Baltic; stipulated for the neutrality of the route across the Isthmus of Nicaragua in the Clayton-Bulwer treaty of 1850, with Great Britain; contended earnestly and successfully with England and Germany for the right of expatriation and naturalization; and, in respect to extradition, I can do no better than cite an English writer, Clarke, who says, in his work on "The Law of Extradition," that "in the matter of extradition the American law is better than that of any country in the world, and the decisions of the American Judges are the best existing expositions of the duty of extradition, in its relations at once to the judicial rights of nations and the general interests of the civilization of the world."

And, lastly, as the noblest of our efforts, the United States

\* Here follow the articles quoted in the preceding address on "The Franco-Prussian War and the Law of Nations."

have been concerned in giving to the world the most signal example of arbitration for the settlement of international disagreements.

Of all these improvements I am far from saying that America has been the sole cause. There have been two parties, of course, to every treaty, and which of the parties most promoted it I am not here to say. Nor will I assert that other nations, not parties to these treaties, did not make others, from time to time, with similar provisions; but I do claim that this country has ever stood in the van of nations for the reform and enlargement of their public law.

These brief sketches of the improvements in international law during the last hundred years, and of the agency of our own country therein, are given, not for the entertainment of our vanity, but for encouragement and incitement to increased effort and further improvement.

The purpose of all the treaties I have mentioned is the establishment of peaceful relations between the nations, the development of reciprocal intercourse and the cultivation of mutual good-will. Peace is the policy of this country, as it is the natural policy of all republics. To them standing armies are full of danger, more danger even to themselves than to their neighbors, as they are ever more ready for internal menace than for external defense. If there be, in such countries, any who desire war, they must desire it because it would bring relief to their private affairs or gratification to their wicked passions, but the wish as the interest of the majority is always peace.

In agreeing to the Treaty of Washington, America and England did more for the reform and codification of international law than was ever before done at one time by any two nations. They not only sought to establish a law of neutrality, but they set an example of incalculable value to the peace of the world. The example has proved contagious already. Witness the subsequent arbitrations between England and Portugal, and between Italy and Switzerland. In six national Legislatures resolutions have been passed in support of the example.

There can be no excuse for war but necessity, and there can be no pretense of necessity when a peaceful means of

adjusting disputes is provided. Every argument against private war applies also to that which is public. The reign of law has put an end to the former. Why may it not also put an end to the latter? As in civil society the crown of its polity is the establishment of tribunals for the adjudication of differences between individuals, so in that greater society, where states stand for individuals, the establishment of arbitration for international differences will be the crown and glory of public law.

This is the consummation that we wish. We desire to see the rights and duties of nations, and of their members toward each other, defined with as much precision as is practicable, and set down in a general treaty, which is but another name for an International Code, and the whole crowned with a stipulation binding the honor of nations that, whenever a disagreement between any of them shall arise, it shall be determined by the judgment of impartial arbiters. We are thus aiming at the improvement of that system of law which establishes the relations of one nation with another, and the relations of their respective inhabitants; the relations, for example, of France with Italy and England, and of every Frenchman with every Italian and every Englishman. Such is the precise purpose of our society, and we challenge for it, not disfavor, but favor; not ridicule, but respect; not disdain, but acceptance. If any one thinks the scheme a chimera, let him ask himself whether there be any great reform now accepted by the world which has not been at some time denounced as a chimera, and consider whether there be greater reason for denouncing this than that. Private war was for many ages held to be just, and practiced as honorable; yet it has long ago passed into the category of things unlawful and dishonorable. The reason of mankind is against public war. The majority stand ready to prohibit it, if they could find a sanction sufficient to enforce the prohibition. They fear that there can be no law without a sanction, and no sanction but force, and, as there is no common force great enough to coerce nations, so there can be no law against war. But do not they err who reason thus? Are there not sanctions where there is no force? Is not the loss of honor, of the respect of others, of self-respect, a sanction suffi-

cient, and even all-powerful, in moral and social relations. Debts of honor are paid more promptly than debts that can be sued for at the law, and enforced by sheriffs. When America and England submitted their differences to the arbiters of Geneva, were they not bound to acquiescence in the award by a power greater than fleets and armies bear—that is to say, the moral sentiment of the world? Is there not, in our day at least, a public sentiment, strong and pervading, which coerces and restrains nations, as it coerces and restrains individual members of society?

In aid of this sentiment and this moral sanction, we point, not only to the sufferings, the cruelties, and barbarities of all war, but to the general inefficiency and folly of war when it is aggressive. I do not say that a war of defense is unjust or unwise. I do not even say as much of all wars of aggression, but this I do affirm, that history can show few aggressive wars which have not proved as unwise as they were unjust. I need look no further than the history of the French, that great and martial people who, for so many ages, ravaged their neighbors, and dominated over Europe. What, after all, have their wars brought them? Wander through Paris and count the monuments of martial glory, study the figures and the scenes displayed upon the column of Vendôme and the Arch of Triumph, and ask yourself what of permanent or real good have they bestowed upon that people? The scroll has been unrolled; the invaders have been invaded; the trophies have been recaptured; the conquests have been regained; and the treasure and the blood have gone for naught. Nearly two hundred years ago Louis XIV, by acts of violence and treachery, made himself virtual master of Alsace and Lorraine. A hundred years later Chesterfield declared, in one of his letters, that he wished the Emperor of Germany and the King of Prussia, together with some of their allies, would take these provinces from France. Look through the years that have since passed. For a while it seemed as if France and conquest were to be synonymous; the French nation first bounded itself by the Rhine, and then marched on wherever it would. Behold it now! Alsace and Lorraine have gone back to Germany. The French have no longer part or lot in the “exulting and abounding

river." The great nation stands to-day shorn and crippled, a warning to the nations of the folly of aggression and the vanity of conquest. All has been lost that she won by the genius of her captains and the valor of her troops.

The culmination of all the changes in public law that have been here described, and of all the revolutions that these hundred years have witnessed among the nations, must be a general revision of international law, and the adoption of some peaceful expedient for the adjustment of international differences.

A great poet of our time and country, whose genius has helped to make the century illustrious, while bewailing the barbarous cruelties of the past, looks confidently forward to the ultimate reign of peace. I will close with a quotation from Longfellow's magnificent stanzas, venturing to express my hope and belief that the blessed time will come sooner even than he dreamed :

"I hear even now the infinite fierce chorus,  
The cries of agony, the endless groan,  
Which through the ages that have gone before us,  
In long reverberations reach our own.

. . . . .

"The tumult of each sacked and burning village,  
The shout, that every prayer for mercy drowns,  
The soldiers' revels, in the midst of pillage,  
The wail of famine in beleaguered towns.

. . . . .

"Down the dark future, through long generations,  
The echoing sounds grow fainter, and then cease;  
And like a bell, with sweet vibrations,  
I hear once more the voice of Christ say 'Peace.'

"Peace! and no longer from its brazen portals  
The blast of war's great organ shakes the skies,  
But, beautiful as songs of the immortals,  
The holy melodies of love arise."

## MISCELLANEOUS ADDRESSES AND PAPERS ON LAW REFORM.

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### STUDY AND PRACTICE OF THE LAW.

Article published in the "Democratic Review," April, 1844.

IN a slight notice of Mr. Duer's "Lectures on Marine Insurance" contained in our last number, we mentioned our purpose to make them, at another time, the occasion of some observations on the study and practice of the law. Having now an opportunity, we proceed with our purpose, not without some misgivings respecting the interest of the subject to general readers. The subject, however, really concerns the whole body social, although it relates chiefly to one profession; for that one is intimately connected with all classes of people, and with civil government itself.

What we are going to say may not accord exactly with either the popular notions, or those which prevail among the legal profession; but we say it confidently, nevertheless, as the result of much reflection. Some persons look with jealousy upon the lawyers as a class, and think that whatever they say of themselves, or of their science, should be received with a certain distrust; while there are others who conceive that the law is perfect, and the profession as nearly so as it can be, in the nature of things. We are of neither class. We think the profession does, at this time, hold certain grave errors, while we think, also, that it is naturally and in fact the first of professions, and its proper employments the noblest which the citizen can exercise in a free State.

It is changed—greatly changed—from what it was, whether for better or worse we need not inquire. They who can recol-

lect the men of the last generation will recall very different figures from those which now occupy the courts. To judge from the portraits and anecdotes of a remoter period, the difference then was still greater. We have a certain veneration for an old-fashioned lawyer, such as we can ourselves recollect having seen in our boyhood. Well do we remember the powdered hair, the small-clothes, the silver knee-buckles, the silk stockings, the gold-headed cane, the steady, upright gait, the solemn countenance. There was none of the bustle of our period. Moderation and gravity were the two words written most strongly on the faces of the venerable men who walked quietly into court in the morning, spoke, when they had anything to say, earnestly and to the point, and then walked home as serene as they came. Some few portraits of the old lawyers are still hanging in the court-rooms, with their placid faces regarding the new spectacle, as if they scarcely knew what to make of it. There is, for instance, a full-length portrait of the late Abraham Van Vechten hanging in the Supreme Court room at Albany; the exact image of the man, as we last saw him. Learned, good, venerable, you felt instinctively a respect for him. When we saw him last, he was arguing a motion before the Chancellor. His full Dutch face, his fine figure, for so old a man, his sonorous voice, deliberate utterance, and earnest, logical argument, made a strong impression on our then young imagination. Was he the last of his race?

The bar is now crowded with bustling and restless men. Those who have the best practice are tasked almost beyond endurance. The multiplication of law-books, and, above all, the multiplication of courts, have quadrupled their labors. The quiet, decorous manners, the gravity, and the solid learning, so often conjoined in a former generation, are now rarely seen together. A new race has sprung up and supplanted the old. A feverish restlessness and an overtasked mind are the present concomitants of a leading position in the profession.

But we must not be detained from the main purpose we had in view. We maintain, then, at the outset, as a fact as well established as any in the history of the race, that the condition of the legal profession is an index of the civilization of a people. The following are some of the reasons of this opinion :



1. As the relations of men multiply, the rules which regulate them multiply also. These relations increase with the increase of population, property, commerce, and the arts. In the primitive condition of the race there were few laws, and those of the simplest description. Wandering shepherds needed not many to regulate their conduct, for they had little to do with each other. If they tilled the soil, they sat down in the spring upon as much unoccupied land as they could use, and in the autumn left it, to be taken again by the next comers. Their law of real estate consisted of the single provision that none should interfere with another's actual possession. Their contracts would be few, and generally consummated on the spot. No need, then, of laws to explain or to enforce them. But when men built themselves permanent habitations, and tilled the same land from year to year, and the son kept what the father had reclaimed, and the products of labor increased, and traffic began, and large communities grew up, taking into their own hands the maintenance of peace and the redress of private wrongs, then other and more complex rules became necessary. As soon as these were classified, and became a study, the science of law began. And when they became too many and too complex to be understood by all the people, a separate class was indispensable, who should devote themselves to the study, and on whom should devolve the interpretation and application of these rules. Then began the profession of the law. The more numerous and complex the relations of men, the more numerous and complex become the laws, and the more numerous and powerful the profession of the law.

It has been said a thousand times, and will bear to be said a great many times again, that the history of a people may be gathered, and best gathered, from its statute-books. What is this but declaring, in another form, that their laws are the measure of their progress?

2. An unscrupulous bar could not exist in an upright community. . . .

This is even more true of lawyers than of public officers. Various causes may happen to put bad men into public office; a defective system of nomination, perverse party spirit, or something else. The elector may be obliged to choose between

two candidates, neither of whom he respects. But the choice of an adviser and advocate is the choice of each person for himself from a numerous body, constantly changing, and susceptible of indefinite increase, according to the demands of society. He chooses for the qualities on which he can most rely. If he be worthy of confidence himself, he never can confide in an unworthy character. They who calumniate the lawyers they consult, calumniate themselves. Just so far, then, as a nation consists of high and noble spirits, so far will the legal profession which it cherishes in its bosom be high and noble also.

3. The judicial department is necessarily recruited from the legal profession. Judges must be lawyers, and chosen only from among lawyers. This circumstance alone, the bare fact that one of the great departments of government, coördinate in power, equal in dignity, and that one, moreover, upon which, more than the others, the safety of the citizen depends, is, by the very law of its condition, eligible only out of the ranks of one profession, is enough to give it a prééminence over every other. . . .

Does not the actual condition of the different nations of the world furnish proof of our position? Who are the lawyers of Turkey or Egypt? What is their condition in Russia or the states of Austria? In France we know that the advocates, since the Revolution, have become a powerful body; and in England they are next to the nobles.

If it be true, as we think we have shown, that the condition of the legal profession is an index of civilization, then its learning, its integrity, its character, are matters of public concernment. With this view we propose to inquire how far it now fulfills the true ends of its institution.

But let us explain what we consider those ends to be. We conceive them to be fourfold:

1. When an opinion is asked, to state the law truly. 2. When advice is asked, to advise justice. 3. When coöperation is asked, to assist the right and oppose the wrong. And, 4. When contending for a client in court, to say all that can be truthfully said, for the client's side of the controversy. If there be any further duties devolving on the lawyer, we do not perceive them, and less than these we can not think will satisfy the just demands of society. . . . But we shall have more to say

of this shortly. It is enough at present to have explained what we conceive to be the true ends of the institution.

We will now explain wherein we think the profession falls short of these ends, and the reasons of it, which we shall consider together. The sources of the complaints against lawyers we conceive to be these :

1. The maxim that they are bound to give their assistance to any person who may ask it, without regard to the justice of his case.

2. A vicious system of procedure, which condemns a considerable class to mere drudgery, and, by necessary consequence, makes pecuniary emolument disproportionate to intellectual exertion.

3. The tendency of legal studies and practice, as now pursued, to make the practitioners satisfied with existing systems, without regard to their imperfections.

To these we may add, that a misconception of the relations between the bench and the bar has led to some of the prejudices against the profession :

First, it has been said, we know not how many times, that a lawyer is not at liberty to refuse any one his services, and that when engaged he may properly do all he can for his client. The great English moralist took this ground, and supported it by an ingenious but an imperfect argument. Lord Brougham has even gone so far as to say, in a speech in the English House of Lords, within a year or two, that the advocate is bound to carry his zeal for his client so far as to forget that there is any other person in the world besides him, and to lose sight of every other consideration than the one of his success.

Now to our view a more revolting doctrine scarcely ever fell from any man's lips. . . . Truth is sometimes difficult to find. There are advocates who

". . . could make the worse appear  
The better reason, to perplex and dash  
Maturest counsels."

Who does not know that, through the efforts of wicked men, vice is often successful, virtue unfortunate, oppressed, overcome? . . .

What would be thought of one who should offer his services to clients to teach indifferently any doctrine in government, in morals, or in political economy, or to advocate any side of an

historical question? Take, for example, the disputed facts in the life of Calvin! Suppose one should offer to take either side as his client might choose. He would be thought a knave or a madman. Why? Because sincerity is an essential element in Christian or civilized society, and because indifference to truth is the state of mind most dangerous and detestable.

Let us not be misunderstood. We by no means assert that an advocate may not take upon himself the defense of a man whom he knows to be guilty. He may. He may not undertake to show him to be innocent; but he may undertake to show the circumstances of his case; to present the palliating circumstances of temptation, or of provocation, or anything else, that may affect the moral quality of the action, or determine the degree of punishment. He may also in civil cases present defenses recognized and provided by law, although he may himself disapprove of the principle and policy of the law.

We have no doubt that the extent of the alleged indifference among lawyers to the moral aspects of causes is greatly exaggerated. In our own observation, we have not discovered anything like the loose notions which Brougham maintains for the whole profession. But there are instances of it undoubtedly. Brougham's speech is itself evidence enough of that—"Forget that there is any other person in the world than his client." What a monstrous declaration! sacrifice everything, every relation, every consideration, to save his client! Forget that there is a society whose welfare the advocate is bound by the highest sanctions to promote; that there are other parties, whose interests are at stake; that there are duties to society, to every member of it, as well as to the one who has retained him! How *can* a man forget these, and retain his conscience or his memory? . . .

The next source of the complaints against lawyers is, a vicious system of procedure. How far the common-law system of practice is capable of amendment, so as to adapt itself to the wants of society, need not now be discussed. The different communities which sprang out of the English people have made more or less changes from the old plan, so that in some of them there is now a very simple if not a very rational system of legal practice. Our observations point particularly to

the practice as it exists in this State. And of that we say that a system more clumsily devised for the accomplishment of its end, and more inconvenient in practice, could scarcely be imagined. It is an artificial, complex, technical system, inherited from our forefathers, and now grown so obsolete and so burdensome as no longer to command the respect or answer the wants of society. Its principal characteristics are a great many forms of an antique phraseology, according to which every controversy in the ordinary courts must be carried on; forms, the reasons of which perished long ago, and which are now become inadequate, uncouth, and distasteful. By reason of the prevalence of these forms in the ordinary courts, another system of courts has grown up, called courts of equity, practicing upon another plan, professing to supply the deficiencies of the former, and yet become themselves so artificial, and withal so dilatory, that their delays and expense have passed into a proverb.

The great evil of all this can be seen at a glance. The whole course of legal proceedings has become a reproach among the people. And although the lawyers are not responsible for the whole of them, they are generally considered so. The administration of the law does not receive the confidence which it would otherwise command, and which is particularly desirable in a popular government. Causes are determined upon technical reasons so often, that a plain man may almost despair of justice.

Upon the lawyers the effect is still worse. To say nothing of the influence upon their own minds—a very serious consideration—it condemns a considerable class among them to the merest drudgery in the world. So numerous are these forms, so complicated the proceedings, that they occupy a large portion of the time of the most numerous class of practitioners, the attorneys, whose time and talents are thus nearly thrown away. There is no real utility in these services; in fact, if nine tenths of them were dispensed with, Justice would be the gainer, because she would be disburdened of a great many clogs and hindrances in her way. The labor is thrown away, and so many fine heads and strong hands are condemned to the servile, the belittling employment of writing out old jingles of words, invented somewhere about the times of the Edwards.

The remedy for this is as simple as the evil itself is dis-

cernible; and that is, to strike out all the jargon, and substitute a plain and rational system of procedure, a thing of no more intrinsic difficulty than the forms of proceeding in other business, or before other public bodies. If that were now done, the number of lawyers might be less, but the occupations of those who remained would be more worthy of the liberal profession they belong to, and would escape the censure which they now receive.

The third source of complaint is the tendency of their studies and practice to make lawyers satisfied with them as they are, and indisposed to change. That such is their tendency must be admitted upon the concurrent testimony of all observers. The reasons of it might not be explained with the same unanimity. Whether it be because the nature of a lawyer's practice confines his inquiries to what the law is, instead of what it ought to be, as most persons who have speculated on the subject have asserted, or whether it be owing to something else, the fact is indisputable that practicing lawyers exhibit that tendency. We say *practicing* lawyers as distinguished from others. Legal writers and professors of law whose minds have not been narrowed by the practice, the faculties of law in the foreign universities, have as enlarged views respecting their science as the writers or professors of any other of the sciences.

The mere practicing lawyer, accustomed to dictate the *responsa prudentum* to listening clients, to confine his vision to single cases, to find the law only applicable to them, comes somehow or other to regard the law, as the geologist regards the earth, or the astronomer the heavens, as a fixed system, which it is his highest ambition to comprehend.

Nothing will ever change this tendency but a more liberal course of study. Comparative anatomy has done wonders for surgery and natural history. Why might we not have *comparative law*, to place the legal systems of different countries and ages side by side, that the lawyer may profit by the history of the world? He is, perhaps, the only man of science who does not look beyond his own commonwealth, and to whom the history of other countries is as a sealed book.

Lastly, there appears to be a strange misconception of the relations between the bar and the bench. The Judges too

often put themselves in a false position toward the bar. The bench is, as we have said, necessarily recruited from the bar. It is instructed and supported by the bar. Now, with this relation actually existing between them, it seems incredible that they should ever stand in positions antagonistic to each other; but yet this is often if not always the fact.

We think the bar have great reason to complain of the manners of the Judges. With some remarkable exceptions, there is not that suavity of deportment, that gentlemanly bearing, which, while it inspires respect, never forgets what is due to others. The language which Judges sometimes indulge in, speaking to the practitioners before them, would ill become a superior to an inferior, and certainly is disreputable in an equal, elevated it may be by office, but still among equals. That such manners should have been borne so long is not a little remarkable. It can not be for want of spirit at the bar, for no man who knows its members can doubt that, but from an unwillingness to engage in personal altercations with a Judge. For no other reasons can we conceive it to have happened that the rudeness of some of our Judges has not been rebuked and repressed.

This misunderstanding between it and the judiciary injures the profession seriously in the public estimation. The people, seeing the treatment which it receives from the Judges, and supposing that they know it better than others, naturally conclude that it deserves all it receives.

Most persons look no further. They do not reflect that, whatever may be the character of the bar, the Judges partake of it. A commission from the Government has not wrought a transformation in their moral natures, nor removed them from anything but the temptations of the practice. The Judge, whose professional life has borne no stain, is little apt to suspect evil of his brethren. He betrays himself when he condemns his former associates.

The Judges sometimes forget their own position, not less than the advocate's. To what but forgetfulness can we attribute the impatience so often betrayed in the hearing of cases, as if the suitor were asking a personal favor, instead of exercising a right? Judges were not made so for their own convenience, but the convenience of suitors. To what but forgetfulness,

also, can we attribute the frequent disregard of the time and convenience of the advocate, and not of him only, but of the suitor, the juror, and the witness?

If we were addressing the Judges, we should remind them that their success and the maintenance of their power depend much on their professional brethren. Without the arguments of counsel their opinions would lose a great part of their value. The ideas, which constitute the merit of the judgment, commonly originate with the advocate. Originality is not always an attribute of the bench. The reasons are discovered and prepared in the lawyer's closet; they are examined and weighed in the Judge's seat. Perhaps the bar requires the higher talent; certainly, it has existed there always. There has never been a Judge in this country who has not had superiors in his court.

We should remind them further that, of all magistracies, they are intrinsically the weakest. If they have been strong, it is because they had a hold on men's opinions. For that they are indebted chiefly to the legal profession. In a popular excitement, on occasions of the exercise of an unpopular judgment, where should they find their best support? They have always found it in the lawyers themselves. Let them imagine the consequence, if these were to take part against them. If it were so, it is easy to foresee that the Judges could not stand the collision. Even now the tendency of the times is to shorten the tenure and lessen the power of the judiciary. As yet the legal profession has formed a wall about it, and protected it. If this wall were thrown down, the judicial establishment as it now stands, with its honor and its power, could not remain.

To these reasons, thus briefly developed, we think the profession of the law owes whatever of censure has been cast upon it. None of them, however, are necessarily permanent. The evil is remediable by the profession itself. They can establish their own maxims, and regulate their own conduct; their united recommendation would produce a reform in the course of procedure; a more liberal and enlarged course of study would dissipate the narrow prejudices which make them bar their gates against all reforms; and a resolute spirit, acting in concert, would speedily reduce a rude Judge into submission to the laws of decorum.



The true lawyer is he who has mastered the science of jurisprudence in its elements and its details; who has compared the laws of his country with the laws of other countries and with the wants of his own; who is always ready to enlarge and beautify the edifice which generations have raised; who holds his learning and eloquence at the service of the injured; who never prostitutes them to a bad cause; and who everywhere approves himself the friend of order and the adviser of peace.

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## REFORM IN THE LEGAL PROFESSION AND THE LAWS.

Address to the graduating class of the Albany Law School, March 23, 1855.

ONE of the most interesting things in life is the spectacle of a class of young men, just finishing their preparatory studies, and about to enter upon the world. The competition of the class gone, the excitement of studies in common over, they are passing from the condition of scholars to that of actors. Our imagination follows them into the future. We see them embark, now for the first time, upon the open sea—where they are often tossed by tempests, and often becalmed, where some are drifted ashore, others foundered, and a few ride prosperously, with favoring winds and swelling sails, into the desired haven.

Such is the spectacle presented to us to-night. A seminary of learning, founded by the zeal and foresight of eminent men, who as judges and lawyers have illustrated the advantages of study, and whose love of knowledge has prompted them to take upon themselves the office of professors and teachers, here dismisses its graduating class, with the first public exercises it has ever yet held on such an occasion.

To us, who are assembled to see them start on this voyage of life, to bid them God-speed, and perhaps utter some words of counsel, there should seem to be no fitter topic with which to occupy ourselves for the hour we pass together than the

obligations which these young gentlemen are about to assume as lawyers toward the community of which they are to form a part. I say *as lawyers*, because I am to speak of the peculiar obligations of that profession; and I add *toward the community*, because I am to discuss, not their duties to their clients, but their duties to the State, and I confine myself to that part of their obligations which results from the present condition of their profession and the subject of it, and which relates to the advancement of both.

The topic, therefore, to which this evening I beg to call your attention, is legal reform in its most general acceptation—that is to say, REFORM IN THE LEGAL PROFESSION AND IN THE LAWS.

The two are intimately connected. An instructed and conscientious legal profession is almost as necessary as a well-devised system of laws; for an uninstructed and dishonest body of lawyers would go far to nullify the wisest code that was ever framed by the wit of man.

Let us first consider the profession. Its present condition we all know. We see and regret its failure, as a body, to fulfill the whole of that high trust which is reposed in it, and to satisfy all the expectations which it might justly raise. Far be it from me, in saying this, to assent to those terms of obloquy with which some delight to assail it, or even to include all its members in the censure to which, as a profession, I fear we must submit ourselves. But every candid person must admit that its condition, at the present, is not such as he would wish it to be. Although it be numerous and powerful, though its members occupy nearly all the offices of the land, though it sees in its ranks a large proportion of the talent and learning among us, it is nevertheless true that its standard of learning is too low, its views of its duty too narrow, its aims too humble, and its voice too weak. The regret with which this confession is made is all the greater, that the opportunities of usefulness were never before so manifested. Foremost in political assemblies, exclusive in the courts of justice, controlling in the halls of legislation, performing nearly all the functions of magistracy, the lawyers have the amplest means of influencing legislation and opinion. It is not too much to say that in no

former period of history, and in no other quarter of the world, has the profession of the law attained to such a development in extent and power. It is natural that it should be so. The importance of the lawyer is always in proportion to the importance of the law. Where will reigns, there is small scope for legal men; where law governs, the lawyer flourishes. So, just in proportion as will gives way to law, that is, in proportion as men become free, in the same proportion the profession grows powerful. Tell me the freedom of a state, and I will tell you the strength of its bar. In the old republics, the advocate was always a person of consequence; but, inasmuch as violence sometimes usurped the place of law, and the rights of the citizen as against the state were ill-defined and protected, the advocate gave way before the chief of a party or the commander of armed men. In Continental Europe, through all its modern periods, the military profession has taken rank and precedence; and even in England, where the bar is so strong, the aristocracy and army have overshadowed it in popular estimation.

But, in our own country, the legal profession has every element of strength and preëminence. Our only sovereign is the law, and lawyers are its only ministers and interpreters. The judicial department is recruited solely from its ranks—that department whose functions are greater than were ever before devolved upon the judicial office, and to whose especial keeping the preservation of written constitutions is intrusted.

A profession thus surrounded, and thus upheld, has corresponding duties to fulfill. Its standard of excellence is measured by its opportunities to benefit and its means to excel. Standing before the bench of justice, it can enlighten and guide its judgment; sitting in the seats of legislation, it can frame wise and beneficent rules for the government of society; administering executive functions, it can temper justice with mercy, and show that an inflexible execution of the laws is the perfection of merciful justice. What, then, with so many opportunities and such means of good at command, might not, what ought not, the bar of this country to be and to do?

To regret that this noble profession of ours, which can accomplish results so beneficial, which numbers among its

members so many of the wise and good of all ages, now falls below its ideal standard, is not enough. It is wiser and manlier to retrieve than to regret. Let us then seriously reflect upon the means of advancement, in the several particulars of *professional ethics, manners, and education*.

First, as to legal ethics. Though it be far from my intention to disparage the moral sentiments of a large class of our most distinguished men, for I know that those sentiments are of the purest and most exalted kind, and equally far from my mind to join in or countenance that flippant and ignorant denunciation which neither discriminates nor examines, but rashly imputes to the whole the flagrant and undeniable faults of a few; yet I must be permitted to say that the prevalent notions of professional ethics are, in one respect, too low, and that we must correct them, if we would hold that place which should be ours of right, and perform that amount of good that is within our reach. I refer, of course, to the opinion that one's duty to his client swallows up other duties.

There is no profession, not even the military, which puts in use the sentiment of honor more than our own. There are daily intrusted to us the property, the reputation, the lives of our clients; yet, when have they been betrayed? The secrets of families are in our keeping, and who will complain of their having been divulged? So far as the relations of the lawyer to his client are alone concerned, nothing could be more unexceptional; they are under the safeguard of that honor which has never yet failed to regulate and preserve them. And what I conceive alone to be wanting is to extend the same sentiment beyond the client to the adverse party and his witnesses, and to the Court.

The fundamental error, on this head, I suppose to arise from forgetting that the profession of a lawyer is a means to an end, and that end the administration of justice. His first duty is undoubtedly to his own client, but that is not the only one; there is also a duty to the Court, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human being can renounce; and a

duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity.

The subject of *professional manners* may be thought by some beneath the dignity of a public occasion; but, though it may be of minor importance, I can not think it unworthy to be mentioned even here. It embraces the official intercourse between the bench and the bar, and the manner in which all the public transactions of the tribunals are conducted; matters upon which their successful working very much depends. There is danger of our forgetting, in the simplicity of our institutions and the ease of private intercourse, that the dignity of judicial affairs requires a certain degree of attention to manner. There is something solemn in the administration of justice, which should banish indecorum, disorder, and levity even, from the place where it is transacted. Nearly all the intercourse in court takes place between the Judge and the advocate; the nature of the business performed, requires that that intercourse should be guarded and respectful—courteous from the bench, respectful from the bar; while the presence of jurors, witnesses, and spectators renders this courtesy and respect essential to the maintenance of that consideration for judicial tribunals, without which justice can not long continue to be well received or well administered. I wish it could be sufficiently impressed upon the minds of all who take part in legal tribunals that disorderly courts can not long continue to command respect; that disobedience out of doors will follow contemptuous demeanor within; and that those judgments are most cheerfully accepted which we know to have been most calmly considered and pronounced. It is not necessary to mention instances of the relaxation of the ancient courtesy. They will readily occur to those who have had opportunities of observation. It is enough to impress upon the minds of lawyers, and especially of young men entering the law, that order, quiet, and the guarded observance of formal and studied courtesy are important, not to say essential, conditions of the successful working of that machinery of justice to which their lives are devoted.

Upon the subject of *legal education* I shall have the assent of every candid member of the profession; for the conviction

is nearly universal that we are in that respect deplorably deficient, and that both the community and ourselves are losers by it to an extent which can scarcely be measured. The courts are annoyed and misled, litigation is fostered, the community is distracted, by undisciplined and ignorant persons, bearing the name of lawyers, who crowd the avenues to the tribunals. If I were asked what subject, more than any other, ought to engage the attention of the profession, I should answer, legal education.

The necessity of a high degree of education is apparent, on the slightest consideration of the nature and object of law, of the office of a lawyer, and of the knowledge necessary to its exercise. The law is the rule of action for the great proportion of the affairs of life. It defines the rights and duties of men, and prescribes the means of enforcing them; its object is to secure to each, his own; in short, its aim is justice. Now, justice is the great end of civil society. It is for this that we have our great establishments in the civil and military service; our elections, our Legislatures, our magistracy, our foreign legations. These are all means to an end, the protection of the individual in the enjoyment of his legal rights.

Justice is attainable only through lawyers. This, I say, as a general rule; for, in particular instances, it may doubtless be administered without their intervention; but, in the main part, they are essential to it. The science of the law is so vast in its extent that they alone can master it who make it their principal study. Only a few men, set apart for that particular calling, and devoting to it the best part of their lives, can learn or apply all the rules which govern the legal relations of men with each other. These rules are as multifarious and complex as are all the relations of all the transactions of the human race. They must be learned before they can be applied; their application is the administration of justice. Thus it happens that the profession of the law is as necessary as justice itself, coeval with the constitution of civilized society, and inseparable from its existence.

What society needs is a body of men versed in the laws; not a body of unlettered persons, calling themselves lawyers, skilled only in the routine of a scrivener's office. A lawyer,

without knowledge of the law, is an imposture. To be really such, is to know the law, in all its departments, in its divisions, almost without limit, and in its generalizations; and thus to know it, he must have studied it as a science, long and well; he must have surveyed its plan, measured its proportions, and examined its details; he must have comprehended the greatness of the whole, the harmony of its parts, and the infinite diversity of its particulars.

Nor is this all, nor even the half of what is required of him. When he has learned from lectures and books the rules of law, he has still two difficult mental processes to perform—one to deduce particular rules from general, for newly evolved relations; and the other to apply an established general rule to meet new phases of facts constantly arising, as various, and yet as like, as the human countenance itself. These processes require the exercise of reason—of reason thoroughly instructed; trained to the carrying on of complex operations; able to trace analogies, detect motives, and separate false conclusions from the true.

Supposing the lawyer to have acquired such a knowledge of the law as we have described, and to have become master of a severe logic equal to his station, he has still to acquire an art, which has ever been esteemed most difficult of acquisition, the art of a graceful and persuasive diction. Without it, the profoundest scholar and the closest logician will fail of that complete success at which the true lawyer should aim. If he were to confine himself to consultations in his chambers, he might forego it; if his discourse were to be made only to the Courts, dry reasoning might avail him; but he is also to persuade juries, which are, to a great degree, popular bodies, subject to popular influences, and always liable to be swayed by an eloquent address. I hardly know of a place where eloquence is more likely to be felt than in the jury-box, after the excitement of a close examination and cross-examination of witnesses, and in a case which appeals to both the passions and the judgment. The gravity of the occasion, the magnitude of the interests at stake, the keenness of the contest, the solemnity imposed by the presence of the Judge, all combine to make the scene impressive, and to add interest and force to the reasoning

and appeals of the advocate. It is on such an occasion, when the nature of the question has obliged him to draw upon all his stores of knowledge, to task to the utmost his powers of logic, and to exert every means of persuasion which the art of the rhetorician can supply, that the true lawyer approaches the ideal which exists in his imagination. It is this ideal that I would set before the eye of every student at law; the image of one whose diligence has compassed the learning required for his profession, who has disciplined his mind to exact thought and vigorous logic, and who writes and speaks his native language forcibly, correctly, gracefully.

How is this ideal to be approached? Not by such study and preparation as are common with us. Persons are admitted to practice after a year or two passed in a lawyer's office, where if they receive instruction it is by chance, and if they read it is amid frequent interruption. No preliminary training is required before a student enters an office, and when he leaves it he is subjected to an examination, which lasts, perhaps, two or three hours, divided between himself and others, and which for all useful purposes might as well be omitted. Introduced into the law, with this imperfect preparation, what happens? Either that he makes up his early deficiency by studies pursued amid the distractions of business or the discouragements of a struggle to obtain it; or that he subsides into that most useless of all citizens, and I might add, most hurtful of professional men, an undisciplined, half-educated lawyer, the transcriber of legal formulas, the promoter of neighboring litigation, the unsafe guide, the hopeless bigot. It is no answer to say that the present arrangement produces many eminent men; they are produced, not by it, but in spite of it. But look around, and tell me what is the proportion of instructed and accomplished men. Listen to the argument presented to Courts, or the addresses spoken to juries, and tell me how defective many of them are, how wanting in scholarship, how poor in conception, how faulty in execution. Or take another test, and a very just one, of lawyer-like training and skill, the written pleadings in an action: what do they disclose of the lack of legal education! Show a Judge a pleading, and it is rare but he can tell from it whether he who drew it is a lawyer in fact as well as in name:



if it be a clear, concise statement of the facts of the claim or defense, set forth with logical precision and order, he has studied his profession to some purpose; if it be confused, redundant, without point or logical method, he is pronounced uninstructed and incompetent.

What, then, is the remedy? Not by any new law, imposing additional restrictions upon admissions to the bar, for that with us is impracticable, even if it were desirable. It is by raising the standard of excellence in the mind of the profession, and, at the same time, enlarging the means of education. Prepare the way for the student to acquire that knowledge, mental discipline, and facility of address, which make the consummate lawyer, and show him, at the same time, that the best chance of competing with his fellows, and winning the prizes of his profession, is by following the way thus prepared, and you will have reformed the profession.

But you must supply the means as well as the incentive for this comprehensive legal education. There is no road to knowledge and discipline, but through training, instruction, and study. You must have instructors, and the accessories to instruction, libraries, examples, and competition. There is knowledge to be acquired by long, systematic, patient study; power of reasoning accurately, closely, to be gained only by hardy discipline of the mind; and the graces of composition and elocution, by observation of the best models and persevering trial. These studies, this discipline, and the necessary practice in writing and debate, can not be had in the chance education of a lawyer's office. It is in schools and seminaries of law, like that in whose public exercises we are now engaged, and there alone, that they can be found. Whoever dreams of effecting a reform in legal education, by any other mode than a full, general, and thorough scheme of public instruction, with the aid of professors, libraries, competition, and debates, will fail of his object; and the sooner lawyers, legislators, and the whole people come to that opinion, the better for us all.

Education is the great republican remedy for public ills; not education for one class or profession, but for all classes and all professions, and such an education as is best adapted to make each perfect in his peculiar calling. With education

comes self-respect and virtue. And he is the wisest statesman, who, in his comprehensive plan, looks, not merely to the education of all citizens in the rudiments of knowledge, but to the education of each for the part he is to perform in life; for the State has an interest not only that all her children shall be taught, but that each shall be taught that which it concerns the State he shall best understand; and while common schools are fostered as they ought, let not professional schools and seminaries be neglected. Instruction in the art of war is justly an object of public concern; so is instruction in all the arts of peace. In what manner, and to what extent, the State should interpose, I do not here discuss; but that it should encourage the spread of knowledge and the advancement of learning, in all its departments, in mechanical arts, in agriculture, in the fine arts, in the medical and legal professions, and in the mathematical and physical sciences, I hold to be a fundamental principle of republican government.

I HAVE THUS CONSIDERED REFORM IN THE LEGAL PROFESSION, as fully as the limits of this address will allow, and I pass from it to the other branch of my subject, REFORM IN THE LAWS THEMSELVES.

The present condition of our law is anomalous. For the main part, it is derived from the common law of England, but so mixed and blended with other rules and usages that it can hardly be called a system at all. The Constitution of the State declares that "such parts of the common law, and of the acts of the Legislature of the Colony of New York, as together did form the law of the said colony, on the 19th day of April, 1775," and the resolutions of the Congress of the said colony and of the Convention of the State of New York, in force on the 20th day of April, 1777, which have not since expired or been repealed or altered, and such acts of the Legislature of this State as are now in force, "shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same." The Constitution thereupon requires the Legislature, at its first session after the adoption of the Constitution, to "appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts there-

of as to the said commissioners shall seem practicable and expedient." The wisdom of the latter provision will be apparent by-and-by.

What was this common law to which the Constitution referred, and which are those parts of it that formed the law of the colony in 1775? The common law, properly so called, is the customary law of England, as it existed before the coronation of Richard I, which was in 1189. But, as this would throw us back, nearly seven hundred years, upon a mass of usages which would not be thought tolerable for any existing civilization, the Courts have been obliged to hold that such acts of the English Parliament, in amendment of the common law, as were passed before the emigration of our ancestors, and are applicable to our situation, are to be considered as part and parcel of the common law. What an explanation is this to give to the citizen of the laws according to which he is to live! If he be certain that he knows what were the customs of England in the reign of Richard, how is he to know to what period of emigration the Constitution refers (for be it remembered that from the first emigration to the Revolution there passed a hundred and fifty years), and by what means can he guess which English statutes the Courts will consider applicable to our situation?

Reflect for a moment upon the state of England at the accession of Richard, that lion-hearted king, whose fortunes are so interesting in the novel of "Ivanhoe," and the laws of whose realm are best known from the pages of Glanville, a writer of the succeeding reign. It was in the beginning of the third crusade. The constitutions of Clarendon had just been established; the dispute between the king and the pope was at its height; the kingdom was parceled out into great fiefs; the majority of the population were villeins or serfs; trade was almost unknown, and violence reigned throughout. There had been several compilations of the laws at considerable intervals by Ethelbert, by Alfred, and by Edward the Confessor; but a hundred and fifty years had elapsed since the last. The feudal system of tenures was in full vigor, with all their oppressive incidents of personal attendance, wardships, marriage, and reliefs; the laws of the forest were conceived in the spirit of

extreme barbarity; and it was common to try disputed questions of right by ordeal or by battle.

To this unwritten or common law are to be added, according to the construction put by our Courts upon the constitutional declaration, the statutes of England applicable to our situation. Thus it is seen that the English portion of law which our English progenitors brought with them was not a homogeneous system, but an irregular mass of usage and statute, derived partly from the traditions of various and discordant tribes and races, partly from the enactments of tyrannical kings and struggling Parliaments, and partly, it may be added, from interpolations by judges and chancellors from the civil or canon law.

But, before the arrival of the English, there had settled in the land, and ruled for nearly half a century, a dissimilar people, whose laws, founded chiefly on the Roman codes, were yet modified by the local customs of the different provinces of the Netherlands. These laws, "the precious customs of Fatherland," as the Dutch settlers delighted to call them, and particularly the customs of Friesland, were the first laws of the colony, and, though long since, in most respects, supplanted by the English, traces of them still exist, and affect property in the oldest of the Dutch settlements.

Upon this English and Dutch stock was ingrafted colonial legislation, which consisted mainly of efforts to adapt the law of aristocratic and kingly England to the circumstances and wants of settlers in the forest on a different side of the ocean. No attempt was made to frame a new system, conformable to the new country, and to the new people that were to be born in it; but the old laws of old nations, strangely compounded of Saxon, Norman, and Dutch customs, of the laws of the Heptarchy, of Alfred, and the Conquest, of the statutes of Merton of Marleberge, Winchester, and Gloucester, were transferred from one continent to the other. Thus it happened that those feudal laws of real property were impressed upon the virgin wilderness, with which the Gothic invaders had afflicted the fair lands where the mild and rational system of the Roman law had prevailed before that fierce onslaught from the North:

“ . . . when her barbarous sons  
Came like a deluge on the South, and spread  
Beneath Gibraltar to the Libyan sands.”

And thus also it happened that a most artificial system of procedure, conceived in the midnight of the dark ages, established in those scholastic times when chancellors were ecclesiastics, and logic was taught by monks, and perfected in a later and more venal period, with a view to the multiplication of offices and the increase of fees, was imposed upon the banks of the Hudson and the quiet valley of the Mohawk.

The colonial legislation which followed the accession of the English naturally partook of the ideas and character of the different emigrations; so that, at the Revolution, New York was governed by the usages of Holland and England, the statutes of England, and colonial usages and statutes, rude and vacillating, administered according to monarchical forms, and by officers the counterparts of those who held office in England.

The Revolution, of course, wrought an immense change in this official machinery; but it made at first very little change in the laws besides. The Judges were commissioned by the State instead of the Crown; writs ran no longer in the name of the king, but of the people. The substance of the laws remained the same; only the confusion was increased by the change of forms; and the inconsistency between the old and the new order of things was made more and more manifest from day to day.

The vast emigration which now set in from different parts of the world tended by degrees, and the stronger as the tide increased, to make subsequent legislation less homogeneous with the old law. Representatives from every nation came to our coasts, settled in the midst of us, infused their ideas into our people, and not infrequently found their way into the places of legislation. This led not only to the naturalization among us of a large number of ideas, introduced by emigration, but to a greater attention to foreign legislation and jurisprudence, and the result is plainly visible in many parts of our laws.

As the results of all these causes, the laws which governed this State, when the last Constitutional Convention began its

session, were as heterogeneous and complex as ever before existed among a civilized and commercial people. The questions which came before the Courts were debated and decided upon consideration of English, and sometimes of Dutch, Scotch, and French law: the *consolato del mare*; the laws of Wisbuy and Oleron; the civil and ecclesiastical codes; the customs of republics and monarchies; and colonial usages and statutes, as well as the statutes of the State Legislature. The proceedings of courts were commenced and conducted according to the rules of Coke and Mansfield, the ordinances of Bacon, and the decretals of the popes; and legal practitioners, as they passed from court to court, became successively attorneys, solicitors, counselors, proctors, and advocates.

The lawyer's library had become a collection of books from the Old World and the New, reports of all the courts in England and in all our States, and treatises from every legal authority in America or Europe. It was therefore to have been expected that the law would become, what it really was, a vast irregular mass, without unity or assimilation. And it should seem to have been but an act of prudent foresight, on the part of the Convention, to provide the means of bringing order out of this chaos, and collecting the scattered and dissimilar parts into one consistent and harmonious whole, omitting what had become obsolete, rejecting what was incompatible with our condition, reconciling conflicting rules, and spreading the whole in one book before the citizens, whose right and duty were at the same time to make the laws and to obey them.

The plan of this address does not embrace the consideration of particular amendments to the laws; but I will so far depart from it, before proceeding with the discussion of the great measure of a civil and penal code, as to throw out for consideration two minor reforms which I think most worthy to be considered in any comprehensive revision. I refer to *the laws of real property and the language of legal documents*.

The law of real property is the most complicated, the most artificial, and the least suitable to our present condition of all parts of our law. Its roots reach into the middle ages, when the learning and refinement of the Roman Empire fell before the Northern invaders. In the Roman law, real property was

treated nearly in the same manner as personal, and with as much simplicity. But the invaders had a military organization, and their distribution of the land was made in reference to military arrangements. Their establishments were essentially military colonies, the first purpose of which was to provide a body of armed retainers. Thence arose that chain of tenures which, with the gradation of ranks, bound together all the orders of the state from the highest prince to the lowest vassal.

The law of fiefs, originally technical and complex, became more complicated and artificial under the influence of the schoolmen; and, though at the epoch of our Revolution it had become softened in some of its harshest features, it was still the most arbitrary and unreasonable scheme of real property that was ever invented. To be a good real-property lawyer has always been a distinction among us; and, although great innovations have been made upon the ancient law by our legislation, particularly by the Revised Statutes, much of its subtilty still clings to it, and its distinction in the eyes of the profession seems scarcely to have lessened. Why it should continue, it would be hard to tell, for there is nothing in the nature of real property which should make its law especially curious and difficult. An acre of land, of a hundred dollars' value, is to this day transferred by an elaborate document, full of quaint and sounding phrases, carefully set in order by a lawyer, after a cautious examination of the title; while stock of the value of a hundred thousand dollars is transferred from one person to another by the simplest of documents, as fast as the price can be paid and a dozen words can be written. If there be nothing in the nature of these two kinds of property which requires this difference in the mode of conveyance, it is clear that a reform is needed in respect to one of them; and that there is no real cause for our distinctions between the law of real and the law of personal property, is proved by the example, not only of the civil law, but of the codes of France and other nations of Continental Europe. The number of sections devoted to real property in the Code Napoléon does not exceed a hundred. Think of this, in comparison with the ponderous tomes in which our law on the same subject lies

buried, the digests, old and new, the glosses and the texts, and the multitudinous reports.

Suppose, for example, it were to be enacted that all real estate should be deemed in law to be chattels real, would any injurious consequences ensue? And if none, how desirable in all respects would be the change! What a load of useless learning abandoned! What simplification of titles produced! Instead of tracing descents, as now, by the uncertain evidence of pedigree, we should have record evidence of every transfer of title.

*In regard to the language of legal documents*, an immense improvement is possible. Uncouth phraseology, repetition, and redundancy, are as useless as they are distasteful. Every scholar would rejoice to see the verbosity, the barbarous Latin, and the Norman French, give way to the simplicity of undeveloped English. Two rules, inflexibly adhered to, would effect a revolution in legal documents: one to write nothing but English, and the other to write as little of that as possible, never using two words where one will suffice.

Let us return now from the consideration of these minor reforms to that greatest reform of all, *the establishment of "a written and systematic code of the whole body of the law of this State."* And first let me explain how the matter stands at present.

At the same time that the commission enjoined by the Constitution was created for the purpose of framing a general code, or code of rights and crimes, another commission, also enjoined by the Constitution, was created for the framing of a code of remedies. The former commission was dissolved without reporting a code. The latter framed, and reported to the Legislature, codes of civil and criminal procedure.

If every branch of the law were codified, it would naturally be arranged in five different parts or codes: that is to say, a political code, embracing all the laws relating to government and official relations; a code of civil procedure, or remedies in civil cases; a code of criminal procedure, or remedies in criminal cases; a code of private rights and obligations; and a code of crimes and punishments. The first three are already prepared. The political code corresponds generally with the



first part of the Revised Statutes. Of the codes of civil and criminal procedure it does not become me to speak, further than to so say that they contain the whole body of remedial law. All that remain, then, to be prepared are what the civilians call a civil code, or code of private rights and duties, and a penal code, or code of crimes and punishments. The latter is on the point of being established in England, and will of course be imitated here. It is in regard to a civil code that the question is most open.

The prejudices that prevail on this subject among the members of the profession, both on the bench and at the bar, are well known, and I would not disguise the impediment which these prejudices create. But I have seen greater prejudices than these pass away: and, believing in the power of reason and the spread of truth, I feel confident that the day is near when we shall all smile at the fallacies which are now so dominant. It may well be true that not one lawyer in five believes in the practicability or expediency of a civil code; but not one in a hundred, ten years ago, believed in the possibility of administering legal and equitable relief in the same action, and by a uniform mode of proceeding; but who in this State doubts it now, or would go back to the separate processes if he could? And I may add that not one in twenty, here or in England, ten years ago, believed in the advantage or safety of making witnesses of parties, though the most conservative bar in Christendom now, as one man, pronounces in its favor, and the old rule of exclusion is thrown contemptuously aside for jest and derision.

How the establishment of a code should have been so long a problem with us is a curious subject of speculation, for certainly all the instincts of republicanism are in its favor. One of the distinctions of our scheme of government is the written Constitution. A written law rests upon the same principle. In monarchical or aristocratic governments it would not be so much to be wondered at that a class should arrogate to itself the knowledge and interpretation of laws; but that this should happen in a republic, where all the citizens both legislate and obey, is one of those anomalies which, however susceptible of explanation, seem at first sight incredible.

Is a civil code practicable, and, if practicable, expedient? These questions present the whole case, and should be answered in connection; for it is the habit of objectors to retreat in a circle from one to the other. If you answer the objection that the code is impracticable, you are then told that, though it might be practicable, it would not be expedient; and if you follow by proving the expediency, not unlikely you will hear again that, though expedient, it is not practicable. Show first that the work is practicable, and, that being done, let not your adversary escape from the position that the whole question has been narrowed to the one point of expediency, and that the decision of this closes the question.

How, then, stands the question of practicability? Is a civil code practicable? The best answer to this question should seem to be the fact that civil codes have been established in nearly all the countries of the world, from the time of the Lower Empire to the present day. Are we not as capable of performing a great act of legislation as Romans or Germans, as Frenchmen or Italians? The very doubt supposes either that our abilities are inferior or our law more difficult. The suggestion of inferior abilities would be resented as a national insult; and who that knows anything of it believes that Roman, French, or Italian law is easier to express or explain than our own? And he who does believe it should, in very consistency, straightway set about the amendment of our own, to render it as easy to learn and as facile to express as these foreign laws.

If it were assumed as essential to a code that it should contain a rule for every transaction that in the compass of time can possibly arise, the objection might have some force; but no sane person holds any such idea. We know that new relations will hereafter arise which no human eye has foreseen, and for which new laws must be made. The plan of a code does not include a provision for every future case, in all future times; it contemplates the collecting and digesting of existing rules and the framing of new ones, for all that man's wisdom can discern of what is to come hereafter. Every existing rule of law is written in some book; the books are infinite in number and abound in contradictions and anomalies. To have a code is to have these rules collected, arranged, and classified;

the contradictions reconciled ; the doubts settled ; the bad laws eliminated, and the result written in one book, for the instruction and guidance of citizen and magistrate, lawyer and client.

This brings us to the remaining question of expediency. Is it better to have written or unwritten law ; law collected in one book or scattered through a thousand ; one system, congruous with itself, where the parts can be seen in their relation to the whole, or disjointed pieces of law, collected from different languages and nations ?

There are two objections, which are the only ones that seem to me to be put forth with any appearance of confidence. The first asserts that an unwritten or customary law has this advantage over a written code, that the former is more pliable, and can be extended and molded to correspond with a changing and expanding social state. This is a favorite argument, but I conceive it to be altogether fallacious. It assumes two things, neither of which is true : first, that law is more flexible because unwritten ; and, second, that flexibility in law is excellence. A law is a rule of action ; to say that the rule is not fixed, that is, flexible, is to say that it is no rule at all. When a decision is made upon the common law, it is announced as an authoritative declaration of an existing rule ; if it be not really that, then the Judges, instead of interpreting, are making law. If it be an exposition of existing law, then it is not alterable by the Judges, and, of course, is no more flexible in their hands than a statute would be. A flexible common law, means, therefore, judicial legislation. Is that desirable ? If there be any reason for the policy of separating the different departments of government, the Judges should no more be permitted to make laws than the Legislature to administer them. All experience has shown that confusion in functions leads to confusion in government. Judges are not the wisest legislators, any more than legislators are the wisest Judges. And if it were otherwise, there is this difference between the two modes of legislation, that legislation by a Legislature is made known before it is executed, while legislation by a court occurs after the fact, and necessarily supposes a party to be the victim of a rule unknown until after the transaction which calls it forth.

The judiciary have no rightful concern with the policy of laws. If they need to be changed, the Legislature is the proper judge of the time and the manner of change. And before all other nations, ours is the one by which this rule should be inflexibly enforced; for, more than others, we hold to the entire separation and independence of the different departments of government, so that neither shall encroach upon the other, and the judiciary shall be independent of the executive, the executive of the judiciary, and the Legislature of both.

Then it is said that, if a code were once enacted, it would soon be overloaded with glosses and comments upon the texts, as numerous and contradictory as the cases upon the common law, which now fill the books. This, if it were true, would only prove that the process of codification must be repeated at certain intervals—an objection of no great force, especially as it assumes that, until the accumulation of glosses and comments, the code would prove an advantage. But the fact is overstated. There would be glosses and comments, of course; but with a common tribunal to settle questions of doubtful construction, it should seem impossible that there should arise half the questions which now occur upon the common law, since the latter regard not merely the meaning but the existence of a rule, the extent of its design, its applicability to our situation, and also its policy.

This objection, moreover, is inconsistent with the first objection which I answered; for, if there are to be so many commentaries and different interpretations, the text and the comments will soon come to have that flexible character which is thought by some to be so beneficial an element of the common law.

Considering, then, these two objections to the expediency of a code to be satisfactorily answered, and turning to the other side, how great are the advantages which we can see in its accomplishment! The numerous collections of law-books upon the shelves of our libraries superseded by a single work; the whole law brought together, so that it can be seen at one view; the text spread before the eyes of all our citizens; old abuses removed, excrescences cut away, new life infused—these will be the beneficent effects of this vast work.

Its accomplishment should seem to be the natural result of a certain advanced state of civilization. Unwritten law is the first result of magistracy. This accumulates during long periods, till society finds its burdens intolerable, and then begins the process of sifting and arranging; the result is a code, the fruit of a riper civilization, the natural relief of a people from the burden of an incongruous, obscure, and overloaded jurisprudence.

The Code of Justinian performed the same office for the Roman law which the Code Napoléon performed for the law of France; and, following in the steps of France, most of the modern nations of Continental Europe have now mature codes of their own.

We have now arrived at that stage in our progress when a code becomes a want; and, however much its consummation may be retarded by the betrayal of seeming friends or the resistance of open enemies, it will certainly, sooner or later, be accomplished. The age is ripe for a code of the whole of our American law. The materials are about us in abundance, derived from many ages and nations; and we must now have a system of our own, symmetrical, eclectic, framed on purpose. I know very well the labor to be performed and the difficulties to be overcome; but the labor will be performed and the difficulties will vanish, when the undertaking is once committed to the charge of able, faithful, resolute men.

Already one of our sister States has created a commission for the purpose. The present Chancellor of England, from his place in Parliament, in a speech on law reform, has said:

"I look further. I conceive there is no reason why this proposed step should not at some future time—some few years hence—constitute the foundation of that which I have always looked forward to as most desirable, though heretofore I have feared it to be unattainable—a Code Victoria, that shall put us on the same footing that a neighboring nation has attained by that great code which will immortalize its creator long after his triumphs and his failures in all other matters have passed into oblivion. The measures, then, which I propose are sure to be attended with benefit at every step of their progress; it may be that all I anticipate from them may not be realized; yet I trust and I believe that, sooner or later, that full and complete result will be accomplished; in this hope, and in this confidence, I advance."

The State of New York owes it to her history and her position not to be eclipsed by others in this magnificent undertaking. That State which shall first succeed in establishing a civil code of Anglo-Saxon-American law, will give law to all the rest of the world where the English tongue is spoken, and that is to be the most nearly universal of any language ever yet spoken by man.

No undertaking which you could engage in would prove half so grand or beneficent. Your canals, your railways, your incalculable wealth, your ships cutting the foam of every sea, the enterprise of your merchants, the skill of your artisans, the fame of your ancestors—all would not exceed in glory the establishment of a code of laws, containing the wisest rules of past ages, and the most matured reflections of our own, which, instinct with the free spirit of our institutions, should become the guide and example for all the nations bearing the tie of our common language.

Shall this imperial State be outstripped in the noble race by either of her sisters, or by that queenly island, mother of nations, which, having been our parent, is now our rival? In material public works, in commerce with all the world, in the accumulation of wealth, in the possession and display of power, and in all the arts, we are contending with her for preëminence; it is now to be determined which shall be the lawgiver of the race. Whether this crown shall be upon the head of the mother, or the youngest of the nations, is the problem which the men of this generation shall solve. May it be so resolved as that we shall win the well-deserved prize; that we shall have a book of our own laws, a CODE AMERICAN, not insular but continental, as simple as so vast a work can be made, free in its spirit, catholic in its principles! And that work will go with our ships, our travelers, and our armies; it will march with the language, it will move with every emigration, and make itself a home in the farthest portion of our own continent, in the vast Australian lands, and in the islands of the southern and western seas.

Let us not fear that anything valuable will be lost from the accumulations of past generations. Whatever is beneficial as well as venerable, whatever is most wise, whatever is approved

by time or consecrated by habit, will be preserved and reënacted. Only that which is hurtful, unsuitable, or obsolete, will be laid aside, as it ought, no matter how long it may have lasted, or how strong become.

To the young men of this generation, more than any other that have ever lived, to you who are now going forth from study into professional life, the great task is committed of reforming and establishing the law. You are now enrolled in that profession upon which, more than any other, rest the functions of government and the preservation of social order. You stand in that great congregation, where also stand the most illustrious men of the past and present ages. Demosthenes, *Æschines*, Ulpian, Cicero, Daguessau, Bacon, Mansfield, and our own Marshall, Kent, and Story, are your professional brethren. To be worthy to stand in such presence, to be influenced by such examples, to catch a portion of their spirit, are distinctions in themselves.

You stand, moreover, in the very portals of a new time. The world is soon to take its impulses from this side of the ocean. The language we speak, the institutions in which we participate, are to spread with our dominion—

“From the world's girdle to the frozen pole”—

and beyond our dominion to remote islands and continents. Whence shall come the lawgiver of the new time? From our own soil, I would fain hope and believe. The materials are at hand, and the time is propitious. A new people, grown suddenly to the strength and civilization of the oldest and mightiest, with laws for the most part borrowed, finds that they need to be reëxamined, simplified, and reconstructed. The task is great, the object is greater, and the reward is ample. Let us, then, be up and doing, that we may have the merit and the satisfaction of having accomplished something toward it, before we rest from our labors.

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## MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE.

Address at the opening of the Law School of the University of Chicago, September 21, 1859.

**MR. PRESIDENT AND GENTLEMEN:** Twenty years ago there was depending in the Supreme Court of the United States a suit respecting the ownership of a tract of land on the southwestern shore of Lake Michigan. The parties in interest were, the Government of the United States on one side, and an Indian trader on the other. The controversy attracted much attention. It was debated with earnestness and ability, but the law was with the Government, and the judgment of the Court confirmed its claim. Thereupon the lands came into market, and the city of Chicago now covers them with railroad-stations, warehouses, and dwellings. That tide which feels no ebb, that stream of people, which moves with the sun, westward, and which, first heard in murmurs on the eastern horizon, rises higher and louder, till it swells like the ocean, has passed over this shore, and is now breaking and dashing a thousand miles farther west. Here and around this tract of prairie, for which the Indian trader contended with the Government less than a quarter of a century ago, the stream has left a populous and opulent city, rivaling in magnificence the oldest seats of government and commerce.

It seems but a graceful recognition of the benefits which Chicago received from that righteous judgment that she should now, in the fullness of her prosperity, found a school devoted to legal science. That, however, is the least of the reasons for the establishment of this institution. The magnitude and importance of the science, the consequent necessity for its highest culture, the usefulness of a school above all other means of learning, the situation of Chicago, its commerce and influence, and therefore its fitness as the place of such a school, are all but so many reasons for its establishment. Yours is the chief city of a great and flourishing State, and it has a position dominant over all the West.



In the Mississippi Valley, this marvelous region of abundance, there are few radiating points, and this is one of them. Whatever light is here kindled, shines through township and village, from the Alleghanies to the Rocky Mountains. This is not only a mart of commerce, but a workshop of the mind. You send your ships over these lakes even to the outer sea; you dispatch in different directions daily and nightly trains of heavily-laden cars; but you can send abroad richer things than these—the products of your mind and the influence of your example.

This school, like the university of which it forms a department, owes its establishment chiefly to the liberality and foresight of citizens of Chicago. A right noble thing was it to found and endow them. Neither the possession of office, even the most exalted, nor the fame of statesmanship, however truly won, will give more certain satisfaction hereafter than the consciousness of having been their founder, or benefactor. For are not the cultivation and advancement of learning, the diffusion of it among men, and the promotion of a higher culture, more rational objects of ambition than wealth or power? And, however large may be a city, however beautiful its streets, and however great its traffic, there is no crown which it can wear so truly light and graceful as a seat of learning, with ample means of knowledge, with doors open to all who will receive it, where all the sciences are cultivated and all the arts can look for assistance.

This is not, however, the occasion to discourse of the value of the sciences or arts in general. We are to-day occupied with one of the sciences. And, even in discoursing of this, I must confine myself to a particular view of it, lest I should weary you. There are undoubtedly several topics, which might properly be considered, in connection with the establishment of this school—as, for example, its relations to the public, to the university and to its own pupils, or the most advisable course of study; but I shall only ask you to consider with me now the magnitude and importance of legal science. And though all knowledge has value, and all the arts their uses, yet, as there are differences in value as in use, I hope to show you that, of all the sciences and all the arts, not one can

be named greater in magnitude or importance than the science for which this school, as a permanent department of your university, is now founded—the science of the law.

Law is a rule of property and of conduct prescribed by the sovereign power of a state. } The science of the law embraces, therefore, all the rules recognized and enforced by the state, of all the property and of all the conduct of men in all their relations, public and private. Wherever there appears material capable of appropriation, whether it be solid earth or flowing water, whether it be the product of the soil or the workmanship of man's hand, there comes the law, and gives you the rule by which you may take it, use it, transfer it. Wherever there is a community, wherever there is a family, wherever there is a man, the law prescribes the rights, the duties, the relations. No engagement can be entered into, no work undertaken, no journey made, but with the law in view. No man walks abroad in the morning, or lies down to sleep at night, or takes his bride to the altar, or lays his child in the cradle, but under the law's protection. This science, therefore, is equal in duration with history, in extent with all the affairs of men.

We can measure it best by tracing its progress. When men dwelt in tents and led a pastoral life, their laws might have been compressed in a few pages. They had, of course, some part of our law of personal rights, the law of succession, and of boundaries between the occupiers of adjoining pastures. This was the condition of the race in the primitive ages, and is even yet the condition of some parts of it. The Laplander in the North, the Bedouin in the South, the nomadic tribes which roam over Central Asia, our American Indians, and the Southern Africans, are in this condition. The Bedouin encamps upon the edge of the sand, or along the declivities of the mountains, his tents, his flocks, and herds, his scanty list of clothing and utensils being his only wealth. When he has exhausted one spot he removes to another, and if he is disturbed he flies to the desert. Nevertheless, he is not without the pale of the law. He recognizes in many things more than the right of the strongest. His personal relations to his wife, his children, and his neighbors are subjects of regulation, and when

he dies his effects are parted according to rule among his kindred.

The next stage in the civilization of the race was the fixed habitation and the cultivation of the soil; and this brought with it the next stage in the development of the legal system—the law of land and of permanent structures—a department which, though it teaches of the most permanent of earthly things, has not partaken of their permanence, but has fluctuated with political condition. The distribution of the land has determined the policy and the fate of governments, and these in their turn have encouraged the aggregation or subdivision of estates, as they inclined to aristocratic or democratic institutions.

We cling, nevertheless, to the solid earth as we cling to no other possession. To possess land, to own an estate, to found a family, and to make for it an ancestral home, are objects of ambition almost universal. We seem to ourselves to be more firmly fixed when we are anchored in the soil. Where a man can stand beneath an ample roof and look over broad meadows and corn-fields all his own, watch the reapers of his harvests, and the cattle in his pastures, he feels more stable in his fortunes, and fancies himself more abiding on the earth, than if his wealth were in ships or factories. Then, the pleasures of agriculture are the most favorable to a serene spirit and a happy life. The fair, which has been so lately held in this city, and of which I hear so much, which so many thousands attended, and where the wealth of your soil was marvelously displayed, bears witness to the interest excited in this pursuit. And, notwithstanding the enormous increase of personal property in our modern society, the larger portion of man's wealth is still in the land. In the State of New York, the most commercial of our States, the assessed value of real property the last year was over a thousand millions of dollars, while that of personal property was but three hundred and sixty-seven millions; and even in its metropolitan city, where there is the largest aggregation of personal property, its assessed value was only one hundred and sixty-two millions, while that of real property was three hundred and sixty-eight millions.

For these reasons, the law, which regulates the possession,

enjoyment, and transfer of real property, has always been the subject of special attention. It has oscillated, as governments have swayed back and forth; at one time allodial, at another feudal; sometimes comparatively simple, then excessively complex; in one country natural, in another artificial. But in all countries, whether in the valley of the Nile, or in an English county, and under all systems, that of the Jews in Palestine, or of the Romans in Italy, or the Mohammedans in India, or the French on the Seine, or the English in Australia, even under the simplest system that has ever been or can ever be devised, the law of real property has ever been and must be large and difficult. The acquisition and use of land, the different kinds of ownership, the exclusive and perpetual, or the joint or temporary title, the conflicting interests of adjoining owners, the relative rights of landlord and tenant, and a thousand other conditions and incidents, can only be regulated upon a careful and minute analysis, by a series of rules adjusted with nice discrimination and adapted to an almost infinite variety of circumstances.

In the next stage of civilization, the products of the soil were wrought into new forms, and manufactured fabrics added to the wealth and comfort of man. Manufactures required the purchase and collection of materials, the employment of workmen, and the sale of the fabric. Commerce led to navigation. Each of these operations added a new chapter to the law.

Of these three stages in civilization and in law, the ancient world was witness, but not in their highest development, though in forms of which the records will last for ever. The accumulation of law-books became so burdensome that, thirteen hundred years ago, it was found necessary to reduce them by substituting digests and codes. The historian of the "Decline and Fall of the Roman Empire" has given us, in a memorable chapter, an account of the men and the process by which this work was accomplished, in the reign and under the orders of Justinian. Since then, however, materials have accumulated, greater by far than those out of which the Roman Codes were constructed.

Of the vast fabric of our present law, it is not difficult to distinguish between what is ancient and what is modern, and

we can see that not half of it is as old as Justinian. While our law of obligations or contracts came from Rome, our law of property and of personal rights came, most of it, from other quarters. The present law of real property in this country and in England was brought from the North or Northeast, by those conquering tribes, whose scheme of civil polity was a gradation of ranks, bound together by feudal ties. This feudal system, after having flourished through several centuries, has been gradually softening and disintegrating under the double influence of commerce and peace. Our maritime law is also in great part of modern origin, for though the commerce of the ancients covered the Mediterranean and the Red Sea, and coasted along the adjacent shores of Europe and Asia, yet the rules by which modern commerce is governed began with the activity of the middle ages, and grew to maturity with the enterprise of our own times. The best part of our law of personal rights we owe to the spirit of Christianity and the influence of chivalry. A man's person is now sacred. You shall not confine it; you may not touch it. He may go or stay wheresoever he will; he may engage in any pursuit which pleases him; he may embrace any faith which appears right in his own eyes. Associations being more powerful than individuals, corporations scarcely known to the ancients have become the most frequent and the most powerful agencies of modern society. During all the while the machinery of government has been increasing and expanding, till volumes are filled with the rules which relate to that alone. And, last of all, there have just appeared the three most marvelous inventions of all time—the steamer, the railway, and the telegraph—which, while they have been making a revolution in the social life of man, have, at the same time, been adding three chapters to the books of his laws. And thus has it happened that the body of the law, the *corpus juris*, as we sometimes call it, has grown to its present colossal proportions; a structure so high and so vast that the mind is lost in the contemplation of its vastness as a whole, and the number and completeness of its parts.

The more perfect is the civilization, the more complete is the law. The latter is, in many respects, both the cause and

the consequence of the former. They act and react upon each other. Ask the man who wonders that there are so many laws, to go with you to the neighboring prairie, and, standing in the door of the farmhouse, with corn-fields and pastures before you, explain to him the title by which the owner holds the land, how far his use is absolute, and how qualified by the rights of his neighbors, or the paramount rights of the State, the relative rights of the wife and husband, the persons who shall succeed when the owner dies, the rights of the adjoining proprietors in the stream which runs through the pasture, the rights of the tenant who tills the meadow, what right the owner has in the shore of the lake, how far he may build into it and on what conditions, the relative rights of himself and the public in the highway before his house, the right which he has to the pew in the church, whose spire shines through the trees, and in the family vault where he expects in due time to be borne. Or take him with you to a point overlooking this city, and look down upon its network of streets, its long lines of private buildings, its public edifices, and its crowded port. The eye is weary with the infinite variety of objects on land and water; the ear stunned by the incessant roll of wheels and the tread of feet. The streets are thronged with men and women, intent on business or pleasure. Vessels are furling or unfurling their sails as they return to port or depart on their voyages. Steamers are plowing the lake; railway-trains are arriving and departing. In all this scene of excitement and struggle, there is not a person, or an act, which the law does not sway, by an influence silent and unseen, perhaps, but none the less effective. Look into the banking-house, and see it at work dictating the form and use of commercial paper, by which the exchanges are effected; there is not a promissory note, or a bill of exchange, that is not in part the work of its hand. Look into the insurance-office, and see the law guiding its operations; the insurance of dwellings, warehouses, vessels, and cargoes, and the adjustment of losses from storm and fire. Look into the counting-room, the workshop, the market, and consider the rules which control the sale and delivery of all sorts of merchandise; those which regulate the building, freighting, manning, and sailing of ships; the construction, repair, and occupation of

buildings. You see the offices of corporations and partnerships. These are the subjects of careful regulation, suited to all the purposes for which such associations are formed, from the smallest trade to the largest enterprise, whether the object be gain, or charity, or human culture. Dissolve this mass of busy men into its elements, and observe that there is a law for each, and peculiar to each; for the clergyman, the lawyer, the physician, the banker, the merchant, the artisan, the seaman. The scholar appeals to it for the protection of his copyright, the inventor for the protection of his patent. You see crowds hastening to the railway-trains or the steamers. Every individual among them relies upon the law for the security of his person and the enforcement of his contract. You see a funeral procession. When the dead man is gathered to his fathers, and the procession has dispersed, his kindred will return to his tenantless mansion to read his will, or to learn if he has left the disposition of his estate to the general laws of succession. Then comes into operation that long chapter of laws, regarding the distribution of the property of the dead, testate or intestate; the validity and interpretation of wills, the fact of marriage, the legitimacy of children, the death of the absent.

How are rights to be enforced? The State itself, of its own motion, undertakes the punishment of the graver violations of law. Hence the need of a penal code, with its definitions of crimes and its apportionment of punishments. These are great departments of the law, which have engaged and will ever engage the attention of the wisest men. The definition of every crime, for which a person may be punished, whether committed against the State or against individuals, and whether affecting property or person, and the just apportionment of punishment to each crime, according to its degree, are subjects of vast difficulty as of vast extent. Observe into what details it is necessary to descend. What acts it is expedient to visit with criminal punishment, who are to be deemed responsible, having regard to age, sex, mental capacity, and civil condition; who are to be treated as principals and who as accessories; what are the punishments which it is proper for a Christian community to inflict upon offending members, and with what view, whether it should be vengeance, penalty, or reformation, there

being different punishments adopted in different countries, some looking to degradation, some to forfeiture of property, some to bodily suffering or restraint, and some to deprivation of life ; these are to be determined by considerations of private right and public policy, depending upon the condition of the offender, upon the degree of injury caused to society and to individuals by particular acts, and upon the adoption of fit means to the end, which is the protection of society. In one stage of social existence an act may not even be punishable, which in another it may be necessary to meet with the severest penalties. Smuggling, for example, is an offense arising out of an artificial condition of society. In our present condition we include in the category of criminal acts not only such violations of the rights of persons and of property as are comprehended within the descriptions of murder, arson, mayhem, burglary, robbery, theft, forgery, and the like, but offenses against the elective franchise, against the executive, the legislative, or the judicial power, against public justice, and against public order, the public health, and the public morals.

For the prosecution of criminals, as well as for judging between man and man, the State provides the machinery of tribunals and officers of justice, and a system of procedure, criminal and civil. The former prescribes the proceedings in criminal cases from the accusation through the subsequent stages, the warrant of arrest, preliminary examination, indictment, plea, trial, judgment, and execution. The latter embraces all civil actions and proceedings, and all the steps in each, the various courts of justice, and the different grades of judicial officers, the parties who may sue or be sued, the times of bringing suits, the places of trial, the various provisional remedies of arrest, delivery, injunction, attachment and receivers, the written allegations of the parties, the elimination of the immaterial from material allegations, the separation of the questions of fact from the questions of law, the different modes of trial, the formation of juries, the conduct of trials, the different kinds of evidence, and the means of its production, the verdict, the judgment, and the execution, the review of the questions of fact and of law, and the time and mode of appeal. There are besides, in respect to special proceedings, a great number of



particular provisions of immense importance, and relating among other things to the prerogative writs, including the great writ of *habeas corpus*.

The machinery of tribunals and officers of justice, though vast and intricate in details, is but a part of the machinery of government. Who that has studied the government of a country, though occupying but a single department in its laws, but wonders at the magnitude of the subject? A lifetime seems scarcely sufficient for its mastery. Political philosophy and history are its adjuncts. Take our political code, survey it generally, enter into its details, study its history, consider how many good and wise men have participated in its framing, how cautiously it has been contrived, amended, added to, debated, at every step in its progress, and then stand reverently before it as the grandest monument of human genius. Time would fail me if I were to attempt recounting even the principal epochs in its history; the long and hardy training of our forefathers beyond the sea, where their institutions were purified by blood and fire, the transplanting of those institutions hither, their curtailment of the monarchical portions, the amelioration which time and experience have wrought, the principle of federation, its origin and development, and the final completion of the vast structure of our Government, Federal and State, through all its parts. The magnificent dome which rises so high into the air and whose arches stretch across the continent, was built with infinite labor, out of an endless variety of materials; while the walls and columns upon which it rests were the slow work of centuries of suffering and patience. Large must be the book which shall even describe adequately this double Government of ours—larger still that which shall contain all the laws by which it moves and all the functions which it performs; its various departments, legislative, executive, and judicial, the powers and duties of all its public officers, its revenues, and the different branches of the public service.

These are general views, as when we look from an elevation upon a scene below. Its immensity is only half comprehended until we enter into details. It is as if upon a mountain-top we look over and beyond hill and valley, lake and

river, and great towns: we understand their distances; we have a general idea of vastness; but when we have descended and traveled over the scene, then and then only we know how vast, how varied, how infinite in details, it really was. The distant mountains, which appeared to have sides as smooth and regular as a garment of fur, we find composed of giant ridges, deep valleys, torrents, and waterfalls. The valley, which seemed spread out like a map of level ground, is filled with winding streams and roads, a succession of hill and vale, covered all over with villages and farmhouses, and vocal with the voices of men and animals.

So would it be with the law, if, after the general view we have taken, you should enter into more minute details. Let us select for example a single department and follow out its subdivisions. Take if you will the contract of sale, and see into how many branches it divides itself. Whether the contract be written or unwritten, whether there be an actual transfer, or only an agreement to transfer, whether the thing agreed upon be already made or only to be made, whether it be sound or defective or deficient in quantity, whether there be fair dealing, concealment, or misrepresentation as to quality, existence, or value, whether the thing has been delivered or paid for in whole or in part, whether the seller or the purchaser ever, and if so when and upon what terms, may rescind the contract and be reinstated—all these, and many more, are considerations affecting the transaction, which the law has carefully provided for, by an appropriate rule.

The law may be compared to a majestic tree that is ever growing. It has a trunk heavy with centuries, great branches equal themselves to other trees, with their roots in the parent trunk; lesser branches, and from those lesser branches still, till you arrive at the delicate bud, which in a few years will be itself a branch, with a multitude of leaves and buds. Or it is more fitly compared with the streams of your own Mississippi Valley, where there is the great parent stream, the father of rivers: into this pours the Arkansas, the Ohio, the Missouri; into these again pour lesser rivers; and still smaller into these last, and so on, till you reach finally the myriads of rivulets, all over the valley, and trace them to their springs. In like man-

ner, the law appears infinite in its manifestations ; the shelves of law libraries groan under the accumulation of their volumes. The curious in such matters have computed that the number of cases in the English Courts relating to practice alone equals twenty-five thousand, and that the common law has two million rules !

Compare this science with any of the other sciences ; with those which are esteemed the greatest in extent, and the most exalted in subject. Take even astronomy, that noble science which numbers among its illustrious disciples Copernicus, Galileo, Kepler, Newton, Laplace, which weighs the sun and the planets, measures their distances, traces their orbits, and penetrates the secrets of that great law which governs their motions. Sublime as this science is, it is but the science of inanimate matter, and a few natural laws ; while the science which is the subject of our discourse governs the actions of human beings, intelligent and immortal, penetrates into the secrets of their souls, subdues their wills, and adapts itself to the endless variety of their wants, motives, and conditions.

Will you compare it with one of the exact sciences—as, for example, with mathematics ? Of this science I would always speak with profound respect. Clear, precise, simple in its elements, far-reaching and sublime in its results, it has disciplined and exalted some of the greatest minds of our race, and been the nursery of other sciences, and of the mechanic arts. Leibnitz, Euler, and La Grange, have been its teachers, and illustrious examples of the strength and elevation which it can give to the intellect. But the science of calculation is occupied with a single principle. This it may go on to develop more and more, till the mind is almost lost in its immensity ; yet the development of that one principle can never reach in extent, comprehensiveness, and variety the development of all the principles by which the actions of men toward each other are governed in all their relations. The law, it will be remembered, is the rule of all property and all conduct. Just so far as property is diversified (and it has scarcely a limit), so far is the law diversified ; and, as varied as are human actions, so varied are the rules applicable to them.

The differential and integral calculus is undoubtedly the

most subtle instrument of calculation which was ever invented ; yet it is but an instrument of calculation, after all.

As man is an object more interesting than any inanimate matter, or any abstract principle, or any instrument of calculation ; as his actions are higher objects in the scale of the universe than the movement of any inanimate thing, so are the rules which are the guides of his conduct greater in extent, variety, and interest than the rules of astronomy and mathematics.

This rapid survey may serve to give us some idea, imperfect, indeed, of the magnitude of legal science. Though it may be the most familiar of all things, it is also the most profound and immense. It surrounds us everywhere like the light of this autumnal day, or the breath of this all-comprehending air. It sits with us, sleeps beside us, walks with us abroad, studies with the inventor, writes with the scholar, and marches by the side of every new branch of industry and every new mode of travel. The infant of an hour old, the old man of threescore and ten, the feeble woman, the strong and hardy youth, are all under its equal care, and by it alike protected and restrained.

It is hardly a weakness for one, who loves it as I do, to seek to detect it in its invisible agencies ; to see it govern where it is silent, and restrain where it is unheard ; to fancy its invisible foot treading in all workshops and markets, and its invisible hand waving the crowds right and left ; to follow its majestic governing and protecting presence into the lonely cabin on the prairie ; into the little hamlet upon the side of the mountain ; into the ship, struggling with the storm in the North Atlantic ; into the room by the wayside, where a few disciples are worshipping God, according to their consciences, amid a population of a different faith, but as undisturbed and as fearless as if they were surrounded by a battalion of armed men.

We have considered thus far the magnitude of legal science. Its importance is more than commensurate with its magnitude. Without it there could be no civilization and no order. Where there is no law, there can be no order, since order is but another name for regularity, or conformity to rule. Without order, society would relapse into barbarism. The

very magnitude of the law is a proof of its necessity. It is great, because it is essential. There is a necessity, not only for law, but for a system, with arrangement and a due relation of parts; for, without this system, the administration of government, both in its judicial and its administrative departments, would fall into irretrievable confusion. It is necessary, both for those who are to administer and those who are to obey. There is, besides, a natural tendency to assimilation where there is a great number of rules, just as there is a natural tendency in substances to crystallization. Law and the science of law go therefore together, and both are as essential as industry, refinement, liberty, civilization.

The science of the law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property and our lives would be at the mercy of a fluctuating judgment, or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others. The law is our only sovereign. We have enthroned it. In other governments, loyalty to a personal sovereign is a bond for the State. Men cohere because they adhere to the throne. We have substituted loyalty to the State and the law for what with others is loyalty to the person. In place of a government of opposing interests, we have a double government of written Constitutions. The just interpretation of these Constitutions and the working of the double machinery, so that there may be no break and no jar, are committed in a great degree, how great few ever reflect, to the legal profession, and are dependent upon their knowledge of the science of law in all its departments, political, civil, penal, and remedial. Precisely, therefore, as free government and republican institutions are valuable, in the same proportion is the science of the law valuable as a means of preserving them.

My subject does not lead me to consider the dignity, value, or responsibilities of the legal profession. We are now concerned rather with the science they cultivate than with them. But, if it were within the scope of this address, I might re-

mind you that the law is lifeless without a sanction and a magistracy to enforce it. When the magistracy is established capable of judging, and independent in its judgment, the office of advocate begins and rises at once to dignity and power, as the means of communication between the magistrate and the suitor, and as assessor or aid to the magistrate.

I might also remind you that the law throws its own importance over the professor who teaches it and the advocate who practices it. Upon the learning, character, and fidelity of its practicers, its administration mainly depends, as we know from their history, and as we might have inferred from their office. In all countries and at all times the character of the lawyer and the public consideration accorded to him have been faithful witnesses of the freedom and civilization of the country and time. Where there is arbitrary power, there is no occasion to study the law; when the law begins to reign, its teachers and practicers come forth; the law and the lawyer go together all the world over.

I might add that, if there be any science and any culture tending to invigorate and sharpen the intellect, they are legal science and discipline. Every science rewards those who study it, by enlarging their minds to a comprehension of its learning; and the greater the science, the greater the reward. But there is something in the conduct of litigation which makes the judgment severe and keen, beyond any other discipline to which it is subjected. While, therefore, the study of the law has the effect of enlarging the vision of its practicers, it has also the effect of sharpening the intellect, leading to precision of thought and language, and acuteness in discovering the truth of facts. Who can unravel intrigues, lift the veil from hypocrisy, dissect evidence, and lay falsehood bare, like the practiced lawyer? Better men have never existed, more exalted in intellect, or purer in motive, or more useful in action, than our profession can show. I should delight in placing some of them before you, and in asking my professional brethren to join with me in saying: let us magnify our office; let us cherish it as full of great traditions, of illustrious examples, of beneficent results; let us fulfill it, as the best agent of political and social good; let us recommend it as requiring

the highest talent, the purest intention, the most patient industry.

But I must return from this digression to the science which is the subject of this discourse. Am I not justified in saying of it that, while of the moral sciences it is the most exact, it is of all sciences the most comprehensive in its compass, the most varied and minute in its details, the most severe in its discipline, and the most important to the order, peace, and civilization of mankind?

How shall this science best be learned? There are three methods: the private study of books; the advice and aid of practitioners, amid the bustle and interruptions of practice; and the teaching of public schools. The inadequacy of the first is obvious; the disadvantages of the second are too painfully known to all of us who studied in that way; the third is beyond question the most efficient and complete. There is as much need of public schools for the law as for any other science. There is more, for, the greater the science, the greater the need. Above all others, this science, so vast, so comprehensive, so complicated and various in its details, needs to be studied with all the aids which universities, professors, and libraries can furnish.

Where else so readily as here will the student obtain a view of the law as a whole, and of all its parts in their several relations and dependencies—here, where are collected the records of the science, where there are professors devoted to its teaching, where there are scholars emulous of distinction, and stimulating each other? If medical schools have an advantage over the former method of study and practice by the side of a practicing physician, or if theological schools give better training than the private study of an ordained clergyman, busy with parochial duties, for similar reasons, a school of law, with its large library, its professors set apart to the duty, its lectures, its company of students, its discussions, oral and written, are helps above all that the private office of a busy advocate can offer to a complete legal education. Not that I would altogether dispense with or undervalue the observation of actual practice obtained by attendance in a lawyer's office, during the smaller portion of his legal course, preliminary to the stu-

dent coming himself to the bar. After the general survey of the law, the comprehension of its parts, and the examination and study of all those parts in their different relations, which a thorough training in a law-school can best give, it would undoubtedly tend to the advantage of the youthful practitioner to pass a few months in the office of an elder brother, observe its methods, and participate in its active duties.

Forasmuch, therefore, Mr. President and gentlemen, as the science of the law is of proportions so vast, and of importance so urgent, the University of Chicago has established this Faculty of Law. It has appeared to you that the institution which your munificence has founded would be incomplete without a department where should be taught the knowledge of American government and law. This department is now inaugurated. It has been studiously framed; it is anxiously watched. It is commended to the legal profession, to the magistracy, to the whole body of citizens.

So long as this university stands—and why should that not be centuries?—so long may its faculty teach sound law and its inseparable concomitants, pure morality and good citizenship. There are universities in Europe which were founded a thousand years ago, and which seem likely to last for a thousand years to come. Why may it not be said of the University of Chicago a thousand years hereafter, as of a still living and flourishing institution, that it was founded in the year 1859, and that this day its Faculty of Law was solemnly inaugurated, in the presence of judges, lawyers, and citizens? May it also in that day, as in all times hereafter, be said of it, that it has always been an instrument of good, that every generation has profited by its teachings, and that teachers and pupils, without exception, have been true to the State and loyal to the law!

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## INTERNATIONAL LAW AND PEACE.

At a banquet to the Chinese embassy, given in the month of June, 1868, in response to the toast, "International law, preserving peace in both hemispheres," the following address was made by Mr. Field:

INTERNATIONAL law is rather a grave subject for an after-dinner speech. But I suppose the committee of arrangements thought that the new international relations which this banquet celebrates required some recognition of the value of the rules which define and govern these relations, and the extension and amelioration which they are likely to receive from the entrance of this new member into the family of nations. Certain it is that there never has been presented a better opportunity for the reform of the International Code than that which this Oriental mission now presents.

International law is the fruit of international intercourse. It is the slow growth of ages, first springing forth on the shores of the Mediterranean, then cultivated anew on the Baltic, and thence extended into the open ocean, till it encircles the globe. The more nation meets nation, the more varied are their relations, and the more expanded become the rules respecting them. International law has grown into a system, so vast in its proportions and so diversified in its details, that it affects, to a great degree, the prosperity and happiness of the human race. Unconscious of it as we may be, it nevertheless guides and supports us in ways innumerable. It marches at the head of armies, it commands in every fleet, it guards the deck of the merchantman, it protects the trader and the traveler in foreign lands. Each new member of the brotherhood of states brings a contribution to its precepts. Its tendency is ever toward amelioration. That great empire which we now welcome into the community of nations will help us, we trust, to still further ameliorations.

Our policy is peace. The beneficent aim of the law of nations is peace. And, although the day may be distant when wars will cease, we believe that it is possible to introduce such reformation of international law as greatly to lessen the occa-

sions of war, and to mitigate its evils when it occurs. If the negotiators of any two states of Christendom were to set themselves industriously at work to remove every cause of difference, and interpose the greatest obstacles to the occurrence of hostilities, can there be a doubt that war between them would be improbable, not to say impossible?

But, however it may be between us and the nations of Europe, let us make war impossible, or all but impossible, between us and the nations of Asia. Here we stand, between the East and the West, stretching out our hands over either ocean; and, while we turn a face sometimes of defiance and anger toward the former, let us begin our international relations with the latter in the spirit of amity never to be broken. May the Pacific Sea ever be peaceful in another sense than that in which it was named! May the treaty about to be made between America and China form a new and better chapter of the law of nations—the opening chapter of a new book, more beneficent than any book of treaties that has ever yet been written! I envy the negotiators of that treaty, both of them Americans, representing, one the youngest, and the other the oldest, of the nations. The wise and the good of all lands will say to them: Write that which will stand for all time, as the model of a just and equal compact between sovereign nations, neither of which desires an advantage over the other, but both of them seeking the freest intercourse of persons, the most liberal exchange of products, constant reciprocation of good offices, and perpetual peace; thus will they help to build up that International Code of the future, in describing which I will venture to use the language, slightly altered, of Sir William Jones:

“And sovereign law, the world’s collected will,  
O’er thrones and globes elate,  
Sits empress, crowning good, repressing ill.”

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## JUDICIAL INTEGRITY.

Article in "The Albany Law Journal," October 19, 1872.

So much has been said and written of late about the integrity of the Judges, that we are tempted to say something upon the subject ourselves. It seems to be supposed in some quarters that the only forms of corruption are venality and partiality. But there are two others quite as bad as, if not worse than, partiality, and they are prejudice and fear. Venality is, of course, the worst of all, because it is sordid as well as corrupt, evincing a low and groveling disposition, along with a dishonest one. Whether this form of corruption has ever shown itself in our State we do not know. No proof of it has been given, and, though it has been suspected, the suspicion, so far as we have learned, may be set down to that meanness of spirit which suspects everybody, or that license which assails everybody in this carnival of envy, hatred, and all uncharitableness.

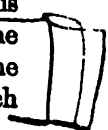
Partiality has been charged and pronounced proved in two instances.

Prejudice and fear have not been charged, at least in a public form; and yet no one has any doubt of their existence. They are as mischievous as partiality, and more to be feared. Prejudice insinuates itself into the mind, in the guise of virtuous indignation; listens to rumor and gossip; believes what it is told; judges without inquiry, and condemns without hearing. The moment it enters the mind of a Judge it unfits him for the judicial office. He may think himself free of it, and even if he be conscious of an unfavorable opinion, he may believe himself superior to its influence, and claim to be able to decide impartially between one whom he regards with disfavor and an indifferent person or a friend. We know that he can not. Judges are but men, and are swayed like other men by vehement prejudices. This is corruption in reality, give it whatever other name you please.

To act with partiality toward a litigant has been pronounced corruption; that is, a Judge has been condemned as corrupt for making a wrong order under the influence of partiality.

Surely it is not a better thing in morals or in law to make a wrong order under the influence of prejudice. To be warped by hatred is no less a meanness and a sin than to be warped by affection. Disliking is no more to be favored or forgiven than liking. For our part, if we care to choose between the two, we should prefer the latter, since there is something amiable and generous in partiality, while there is only weakness or ill-temper in prejudice.

There are Judges, and among them some who are commonly thought to be models of integrity, who could no more judge impartially between certain persons and their adversaries than they could change their religion. There are men in this State who could not obtain exact justice, such is the prejudice accumulated against them. This is a reproach, we know, but it is true, nevertheless; and the truth may as well be told. The weakness of an elective judiciary and the demoralization of the press have made justice almost impossible in any case which



Fear is another form of corruption not less injurious, and not a whit more respectable than partiality or prejudice. Upon any just gauge and measure of the three, fear should be accounted the basest and meanest of all. To be afraid is the miserable condition of a coward. To do wrong, or omit to do right from fear, is to superadd delinquency to cowardice. Intimidation may come as surely from a clamorous crowd or a ribald newspaper as from an armed ruffian. To be coerced or misled by it in any form is to be corrupted. It does not matter whether a Judge be overawed by a sovereign on the throne or a sovereign at the ballot—by the king or the people. It is the same in essence, and he who quails before it is the betrayer of a trust as sacred as was ever committed to human hands.

We are not speaking of the merely speculative evil, but of an evil practical and present. No man can be so blind as not to see that Judges are dictated to by politicians and the press; that language is addressed to them which those who use it would not dare to utter if they did not think the Judges could be intimidated: they are told what the public expect; they are told that they themselves are on trial, and, if they decide this way or that, they will be marked and denounced. There is no

occasion to specify instances. Ask the lawyers, for they are, of course, the best witnesses. Ask the first one of them you meet whether, in a particular case, which has raised a general clamor, he thinks an impartial trial can be had; impartial either as to Judge or jury. He will answer you that he thinks it can not; that he thinks the public mind has been so warped by continual clamor as to make the impaneling of an impartial jury impossible; and the Judges are so sensitive to the attacks of the newspapers, that either their convictions are influenced by their fears, or they are afraid to act upon their convictions.

That this is deplorable every just man will admit; but deploring it will not cure it. We must take measures to correct the evil. We have no right to console ourselves with the fact, undeniable though it be, that in the main justice is impartially administered. So it is in France, and generally throughout the Continent of Europe. Private cases, which create no public excitement, are debated and discussed calmly, impartially, and justly; but in public cases, and those in which the Government is concerned, the Judges are, or are suspected to be, under public or court influence.

One step toward a remedy is the reformation of public sentiment. Let good men everywhere speak what they think about any form of corruption of the Judges—not only that which results from venality or partiality, but that which results from prejudice or fear. The very word “corruption” inspires dread. Men shrink from it as from infamy and degradation. Judges, who would resent the suspicion of it as the grossest of affronts, do yet suffer themselves to be deluded by prejudice or turned aside by the ignoble fear of newspapers, or the dread of what is called public opinion. They forget that, in giving way to prejudice or fear, they prove themselves as corrupt as those who give way to partiality. Let them not comfort themselves with the thought that, by drifting with the current, they escape contention. They were set in their places with the very design of resisting currents, and standing immovable in the rush and whirl of contending parties and clamorous multitudes.

These reflections, suitable at all times, are most opportune now, because of the unnatural excitement by which the whole community has been agitated for the past twelve months, and

the bitter invective from all sides that fills our ears with its ceaseless din. The newspapers rave with real or affected passion. Violent language is ordinary speech. Suspicions fill the air. Distrust and alarm prevail; and all these things make the position of a Judge a difficult post at best, but now a post of unwonted peril and temptation. The more honor to him who holds it bravely. He may possibly suffer present inconvenience, and lose for the moment in public estimation, but he will not lose his self-respect, and he will gain the respect and admiration of just and honorable men in that calmer future when the present agitation shall have passed away.

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## THE LAW AND THE LEGAL PROFESSION.

At a dinner of the Mercantile Library Association in New York, in November, 1874, Mr. Field made the following remarks in regard to the nature, development, and purpose of law, and the duties of the legal profession:

You call upon me to speak for the law. That word has two senses in common use, one signifying precept, the other example. The former began with the beginning of the race. Consisting, at first, of the rudest rules of the rudest tribes, it grew as the race grew; expanded with their expansion; was added to, with each addition to their wealth, intelligence, commerce, and arts; and as, in the course of ages the tribes melted into larger communities and nations, the various rules of the constituent parts were blended and assimilated, and there came forth a great body of law—the collective will of sovereign states, the rule of property and of conduct for civilized millions, covering alike the city, the village, and the fruitful field, the guardian and guide at once of the weak and the strong. This law, even when invisible to the common eye, is the measure of our daily life, it covers us with its shield, restrains us by its power, and, so far as mortal fear can make it omnipotent and omnipresent, it goes with us wherever we go, by the side of every carriage on the loneliest road, on the deck of every ship even to the farthest sea.

No wonder that an old author writes, "For the knowledge of the law, as Doderidge saith, is most truly styled, *Rerum divinarum humanarumque scientia*, and worthily imputed to be the science of sciences, for therein lies hid the knowledge of every other learned science."

But great and wonderful as is this learning, it lies with us, scattered in thousands of books, with countless anomalies, and endless contradictions, difficult of access, a shapeless mass of precedents and statutes. This is not creditable to our civilization. Give us, I say, a written code of all our laws, that he who runs may read, and may be able to understand.

Here, at this table, are representatives of the Federal and the State governments, the second magistrate of the former and the first magistrate-elect of the latter, and to them I beg leave to say, in your efforts to cure the disorders of the times, which I grant are many, Do not forget to help us to that which we most sorely need, a consistent and intelligible body of law.

Having thus spoken of the law in one of its senses, let me speak of it in the other; that is, the profession of the law, in both its departments of judges and lawyers, for these are parts, inseparable parts, of one great profession. Without the law in this latter sense, that of which I have spoken will be either a dead letter or an instrument of intolerable oppression. It is the profession which gives to the doctrines their life and vigor, holding them as a shield before the weak and a sword against the strong.

Looking at other countries you will see the same system of legal science working out different results as it is worked out by different hands. The law of Rome, the civil law as it is called, which, beginning with the twelve tables, spread out from the Tiber, invaded province after province and took so firm a hold of the habits, the sentiments, and the reason of men, that now after the Roman Empire has been broken in pieces like a potter's vessel, it continues to rule the greater portion of Christendom—that law when it comes to practical administration, is one thing in one country and another thing in another. The careful student will not fail to read, in political annals, this lesson, that in proportion as men are safe in their homes, in the same proportion the lawyer and the Judge are respected

and powerful. Whichever be the cause and which the consequence, the fact remains, to which all history bears witness, that the law and the lawyer are inseparable concomitants, and the power of the one rises and falls with the power of the other. This fact, one out of many teaching the same lessons, shows us the value to be set upon the learning, the uprightness, and the independence of the legal profession. Those three qualities are the conditions, each and all, of safety to the citizen and of honor and success to the lawyer: learning, that he may not mistake and so misinterpret the law, which it is his province to administer; uprightness, that he may act according to his conscience—not the conscience of another man, but his own—or, in other words, that he may be true to his convictions and independence; that he may have neither will nor motive, to pervert his judgment or sway his conduct; independence, I say, for both departments of the profession, that which occupies the bench and that which occupies the bar—independence each of the other and both of the rest of the world. When I see a Judge caring for, or, worse, pandering to, the prejudices or passions of the many or the few; when I see him courting popularity; when I see him regardful of anything on the earth but the law and the testimony in the case before him—I look upon him as a betrayer of his trust, and I would paint upon his forehead and sew upon his garments, so that all men might read those two words (never were words so well yoked together), which in conjunction Burns has made immortal, “traitor knave”; and when I see a lawyer considering what men will say of him if he takes up this cause, or rejects that, I think of him, remembering other words in the same poem, that he will at his latter end “fill a coward’s grave.” My ideal of a Judge is of one who comes into his high office with a rich store of learning, with a conscience void of offense, with a patient judgment, without prejudice and without passion, with a love of the truth, whatever it may be, as he hears it from the lips of lawful witnesses, or reads it in the books of law, rejecting all other advice or influence as unlawful intrusion, and disdaining every attempt to intimidate or lead him in whatever shape and from whatever quarter it comes, whether by private solicitations or public discussions, whether from the street or



the market, the pulpit or the press ; and my ideal of a lawyer is of one who, rich in the same learning, feels the same disdain of intimidation, consults only his own convictions, and stands ready, at all times, to assert the rights of any man, according to the law of the land.

In short, this is my conclusion of the whole matter : The need of civilized society (and the higher the civilization the greater the need) is neither good laws badly administered nor bad laws well administered (for good laws badly administered are good for nothing after all, and bad laws well administered are bad laws after all), but the need is good laws well administered, or, which comes to the same thing, a written code of all useful law which all may read and be able to understand, together with a learned and conscientious bench and bar that nobody can frighten.

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## RIGHTS OF PARTIES AND DUTIES OF COUNSEL.

Extracts from the address of Mr. Field to the jury in the Tweed case, published in the "Albany Law Journal," March 18, 1876.

FROM the time when this suit was brought last spring, down to the time of trial, we heard nothing but denunciations of the defense for impeding the course of justice. There was indeed no real defense, it was said, and repeated so often that they who said it, at first in ignorance or bad faith, may have come at last to think they had reason to believe it. We have now reached a decisive trial of the merits, if a first trial of a cause so important can ever be thought decisive, and, after two months of hard labor, what is the result ? Why, that the plaintiffs are already defeated in respect to more than two millions of their claim, a sum worth contesting for, to my thinking, and we are now coming to you, gentlemen, to decide whether the claim shall not be still further reduced or rejected altogether.

Above all other things is justice : success is a good thing ; wealth is good also ; honor is better ; but justice excels them all. It is this which raises man above the brute, and brings

him into communion with his Maker. To be able to stand impartial in judgment, amid circumstances which excite the passions, to maintain your equipoise, however the surging currents may be around you, is to have reached the highest elevation of the intellect and the affections. To have the power of forgetting for the time self, friends, interests, relationship, and to think only of doing right toward another, a stranger, an enemy perhaps, is to have that which man can share only with the angels, and with Him who is above men and angels.

The part which you are now called to perform in an official act, designed to be an act of justice, is unhappily beset with difficulties. The just indignation of a betrayed and defrauded people, the abhorrence that every true man feels of robbery, public or private, the cry for redress, the thirst for vengeance, the suspicions which fall alike upon the innocent and the guilty, the corruption of our politics long accumulating, and more and more corrupted by the demoralizations of the war, the malversations in office, which seem to grow day by day, the stories of these wrongs repeated, exaggerated, distorted by a press which lives upon sensation, and operating upon a people becoming every year less sedate and more impulsive, until it seems ready to fall under the reproach once cast upon an ancient race, "unstable as water, thou shalt not excel"—all these things have brought us into a condition as frightful as it is abnormal, which would almost justify for once the language which the greatest of English dramatists has used for other turbulent times, "Judgment has fled to brutish beasts, and men have lost their reason."

It is easy to see what act of each of us would commend us most to the clamorers of the hour. If the learned Judge, who has presided with so much dignity and patience, had yesterday announced from the bench that the defense is a miserable subterfuge, unworthy of a moment's serious consideration, instead of ruling as he did, he would have been applauded this morning by half the newspapers of the city as a Daniel come to judgment; if you, gentlemen of the jury, were to render a verdict for the whole amount claimed, without leaving your seats, you would be greeted with the welcome of good and faithful servants; and if we, who are conducting the defense,

with what fidelity you may judge, were to betray our client, and suffer judgment to pass against him, with only a seeming effort in his behalf, we should have the comfort of being informed in the same newspapers that we had half redeemed ourselves from the disgrace of defending him at all. This might happen to-day. But how would it be ten years hence? If you should then look back to this court-room and these surroundings, read the journals which you read this morning, and those others which you have read from day to day during the trial, what would you say or think? Are you sure that you would then regard most of the comments on this trial which you now see printed and spread before your eyes each day as anything better than the babblement of idiots?

How will it be with each of us in our judgment of ourselves? How will it be with a new question? What you do, what the Judge does, what the counsel do, will be thought of for a long time hereafter. There are many other people than those who now surround us, who will observe, criticise, and judge all our acts, without partiality and without passion.

For myself, personally, this trust has been an occasion of great embarrassment. Severe illness in my family during the whole period has caused me anxiety by day and interrupted sleep by night, which have, in a measure, unfitted me for the discharge of my whole duty to my client. What that duty is, that is to say, what is the duty of an advocate to his client, I have had frequent occasion to explain, and every day's experience and observation have but served to confirm the convictions of my earlier life. The ignorant and the wicked always wish to take the law into their own hands. The wise and the good get the best Judges they can, procure as good laws as they are able, and leave the administration of justice to those to whom it is confided and who alone are competent to its due performance.

In this country we who rejoice that we are the heirs of all the ages have, in our own conceit, at least, built on broader foundations than our fathers and with stronger walls the defenses of human rights, and among them all there is not one of greater significance than this, that no man shall be deprived of life, liberty, or property without due process of law. The peo-

ple of our State have placed it in their State Constitution, and since the late troublous times the people of the whole country have placed it in the Constitution of the nation. There it stands, and will ever stand, so long as either the nation or the State remains. *Manet et manebit*. How idle, then, it is to talk of excluding any person whomsoever from defense or opportunity of defense to any charge whatever! In conformity to this fundamental law, a summons is served upon every defendant to answer a written complaint. It is his right to answer. How can he exercise that right without the aid of counsel? Therefore he, whoever he may be, who denies the right and duty of counsel to defend any man, seeking his aid in defense, denies the right of the man to defend himself, and whoever in this country denies the right of any man to defend himself must be accounted as either a knave or a fool.

I am quite indifferent to the reproaches that out-of-doors have been cast upon me for my defense in this case. When, however, the reproaches come into this court-room, and are made as if they could affect you, I feel bound for that reason alone to take notice of them, so far, and so far only, as to say that I despise them. I prefer the judgment of my brethren of the bar. If the press were unanimous, which it is not, nor anything like it, the bar is stronger than the press. It does not make so much noise, but its influence, though silent, is irresistible. Mr. Willis invented the convenient phrase of the "upper ten thousand." Using it here, not in relation to general society, but to the society of lawyers, I venture to say that the opinion of the upper ten thousand of American lawyers will sooner or later become the opinion of the American people. I am well aware that in this State at least some traces of the irritation may yet remain, which a lifetime of warfare against legal abuses has engendered. By many of my elder brethren I am regarded as one who has overthrown their idols and brought their false systems into derision. I do not complain. I have had my reward. The Reformed American System of Procedure, as it is called by one of the best legal writers of our time, opposed and derided as it was at first, has made its triumphant march around the world, and is already written in the laws of half the English-speaking people, and

will yet be written in the laws of them all. Even now while I yet speak they are writing it in the law of Australasia. But whether any trace of the irritation which this has occasioned is remaining or not, I am ready to leave my defense of this case to the vindication of my brethren throughout the country, confident that they will say I am maintaining, as I have ever maintained through a long life, the dignity, honor, and independence of my profession, my order—the order of advocates, to which I am proud to belong—and in that way, for they are inseparable, the rights of all the people.

[Mr. Field here discussed the political aspects of the case, and declared that the prosecution was not in good faith.]

I have dwelt thus long upon this topic because I think it gives the key to this prosecution. My deliberate conviction, after the most careful attention—and I hope I do no injustice to the motives of any—my deliberate conviction is, I say, that this action has not been brought in good faith for the purpose of obtaining what is justly due from the defendant to the county of New York, but that its purpose is personal and political advantage to those who have control of the proceedings.

Having laid before you these general observations, preliminary to the main inquiry, I pass to a consideration of the precise issues which the case presents for decision, and of the evidence upon which the decision is to be made.

[After considering the evidence and its applicability to the various items claimed in the plaintiffs' account, Mr. Field concluded as follows:]

Such are the considerations, gentlemen, which I have ventured to offer for your attention when you deliberate upon your verdict, and I end as I began, by appealing not only to your intelligence, but to your love of justice. I appeal to that regard for fair play which every American is taught from his childhood, to that sentiment of honor which disdains the use of a State prosecution for personal or political ends, and to that hatred of oppression which strives ever to defeat it, even though clothed in the forms of law.

THE NEWSPAPER PRESS AND THE LAW OF  
LIBEL.

Article in the "International Review" in July, 1876.

THE condition of the newspaper press in this country is a subject of constant observation and constant complaint. Nobody defends it. The newspapers themselves deplore it. The New York "World," of the 30th of last April, in its leading article bewails the outrageous license of its fellows, recognizing the truth that "private character, no matter how honestly or how brilliantly earned, has absolutely no valid safeguard in this country, except in a much keener and livelier sense of its sanctity and value than has of late years existed among us. . . . Every reputable man in a civilized society," it asserts, "belongs to a permanent citizens' association bound to punish disgraceful conduct with disgrace, bound to defend honest men against slander, bound to bring the slanderers of honest men, first to contempt and then to chastisement. A society which loses its sensibility to any one of these duties is on the downward road to social disintegration, and in sharp peril of losing all that can make the social bond either beneficent or durable."

We had collected articles from different papers, with the design of publishing extracts from them at the head of this article, as specimens of the food which American newspapers serve to their readers. But we reserve them for another occasion, simply observing that no language of disfavor can be too strong for their unsavory condition. Meantime we propose to make some observations upon our newspaper press generally, in connection with our law of libel.

In Mr. Hudson's book on "Journalism in the United States," he estimates the number of newspapers and periodicals in the whole world, outside of this country, to be 7,642, and the number in this country he puts at 5,871. No wonder that he also says: "To-day the newspapers are filled with personal allusions, and all sorts of charges are made against individuals and office-holders. Some of them are of a very serious character."

These charges are against presidents and politicians, lawyers and lobbyists, clergymen and choirs, counsel and clients, brokers and bankers. Notes of correction are sometimes published. No other notice is taken of many of them. Still, the 'Herald' says there are nearly a thousand suits pending, with \$50,000,000 in damages depending on the result. Let us have a national law of libel—a national code that will benefit alike the press and the public. That will be a step in the right direction."

When, in 1871, a series of gross frauds upon the municipality of New York was first made public, an investigating committee of citizens was appointed, and here is what they said of the relations of the press to the municipal authorities of that time :

"Of the expenses [of advertising] incurred by the county, \$182,468.22 have been approved by the present Board of Supervisors, \$173,800.22 of which was for bills of sixty-nine newspapers for advertising approved by the Board, 19th September, 1870. . . . The Legislature passes laws limiting the number of newspapers to advertise notices of various kinds, but the proprietors disregard such limitation, publish every notice they see in the papers duly authorized, and the supervisors thereupon 'audit and allow' the bills, or, if they do not, suits are instituted against the county, which generally result in judgments to be paid by the Comptroller."

We have a country newspaper now before us. Its name we will not mention, contenting ourselves with observing that it is the principal paper in a town of more than ten thousand inhabitants. Weak in thought, common in expression, vulgar in anecdote, and flat even in its jokes, the only thing about it which could make it tolerable to any decent reader at home is its local news. This is one of its paragraphs copied from another paper : "'Periodical neuralgia' is what they call it in Washington now. Grant has it, and has not been able to see visitors for several days. Parson Newman prayed for him on yesterday, and the parson's intimate relations with Divine Providence, backed by continued liberal doses of hydrate of chloral, justify the hope that the patient will get his nerves steadied in a day or two."

We might be thought extravagant if we were to say that this paragraph, copied by one paper from another as fit reading for the subscribers to both, is a fair sample of the items with which three fourths of the newspapers published in the United States abound, but we believe it to be a fair sample nevertheless.

That there is something radically, flagrantly wrong in the conduct of most newspapers in the United States, no candid person will deny. That this something lies in the general tone of editorial comment and the indulgence of personalities, is equally manifest. That the right of reputation, that great right, without which all other rights lose half their value, is habitually violated, and that there is no adequate redress for the wrong, are palpable facts. The demoralization is widening, and has widened steadily for three quarters of a century. Jefferson said, in his time, that the press was *putrid*. It has since become putrescence putrefied. The first effect is to make cowards of nine tenths of our public men. These live generally in such servile dependence upon popular favor, that the first whiff of a newspaper, which may possibly affect the votes of half a dozen unthinking voters, sets them trembling. They make a mistake, for independence and pluck are more prized by the people than favor with newspapers. When a candidate for office makes his appearance, he is assailed, of course; if he is elected, there follows a short lull, and then comes an attack for official neglect, or official abuse. Not long ago, there was appointed a new police superintendent in this city. Almost simultaneously with notice of his appointment, there came notice of his trial for something. If the newspapers are to be believed, scarce an honest public officer exists in the whole country. Does it not occur to these traducers that the surest way to make men dishonest is to create a universal belief that they are so? As things go now, all distinctions are confounded; the honest man and the knave are alike suspected, and alike denounced; and each has about the same chance of vindication before the courts or the country. Respect for public office, a respect which is even more important to be maintained in a republic than in a monarchy, seems to have faded away. The President of the United States is saluted in the news-



papers as "Boss Grant," and the Governor of New York as "Sammy."

What is the explanation of these phenomena? We all know that the greater number of American newspapers do not represent the opinions, the tastes, or the morals of the better classes of the American people. Why is it so? To answer this question, we have to consider the general office of a newspaper, and the peculiar influences which affect our own. The primary office is what the name imports, to publish news, the secondary one, to give a running commentary on men and things thus brought into view. The publication of a newspaper is a trade. The object of the publisher is to make money. In the pursuit of this object he employs such editors as he thinks will gain or save the most. Moral considerations are secondary. To feed the appetite, flatter the self-love, satisfy the curiosity, or catch the whim of the largest number of readers at the passing moment, is the supreme motive. The love of truth, the sacredness of right, the public good, kick the beam, when weighed in the scale against the love of gain. All that contributes, or is supposed to contribute, to thrift, that is, whatever will increase the number of copies sold, and of advertisements handed in, such as startling news, public or private scandal, sensational comments, these are sought and used. As the press of advertisements bears a certain ratio to the circulation, whatever will procure the most buyers—which is the same as to say that whatever will satisfy the wants or gratify the tastes of the most readers—will find its way into the paper. It is made up, not for the cultivated few, but the uncultivated many. Whenever the choice lies between ministering to the lower but wider and more remunerating tastes on one side, and on the other, informing and stimulating the minds and hearts of intelligent and thoughtful men and women, the former will have the advantage. Hence we hear so much of the comparative circulation of different papers, the angry contentions between them about it, and the absurd boasts, not of the quality, but the quantity let loose.

The visitor to the Beecher trial last summer always found gathered a crowd of reporters watching over the details of

the disgusting scandal, like cormorants over a carcass, that they might fly with the pieces to the four winds of heaven.

We do not forget, in making these observations, the influence of party. That is undoubtedly one of the forces which deflect the press from its true direction. The subserviency to party manifested by editors of newspapers is, however, a fault not peculiar to them, but common to most Americans.

Our newspapers have a larger number of readers than any other papers in the world. Almost everybody here can read, and almost everybody is too busy to read except hap-hazard and by snatches. If ever waiting or idle, the American takes up the nearest readable thing, and that of course is the newspaper, reads a little and lays it aside. It thus furnishes the principal reading to ninety-nine hundredths of our countrymen, and is fashioned to attract the majority of these ninety-and-nine. This will account in a great measure for the low tone of the American press, compared with the tone of the press in other countries, where the readers are fewer in number and more choice in their tastes.

But it will hardly account for the personal abuse with which our press abounds, unless it be supposed, what we are unwilling to admit, that the great majority of Americans delight in calumny, and roll hard names as sweet morsels under their tongues. This we do not think is a just estimate of their character. They prefer on the whole to have their neighbors praised rather than blamed, to believe good of them before evil. We must seek other causes of the personal bitterness which disfigures American journals, and we think they are to be found in what, for want of a better expression, we will call personal journalism.

It is a favorite argument of our newspaper men that the paper is and should be impersonal. On this theory they defend its anonymous publication. If you insist that the protection of private character requires that all articles should have an avowed sponsor, with his name subscribed, they answer you that it would weaken the authority of the publication and make it less independent and therefore less valuable. This is not true in reason nor true in fact, in any country or under any

circumstances; but, if it were true at some times and places, it is not, and could not be, true here, so long as we have editors who make their columns their personal organs, or the organs of little coteries to which they belong, the instruments of their likes and dislikes, their self-love and their spite, their friendships and their hates. Sometimes they claim a sort of judicial function, and even talk of rendering their verdicts. Yet so little have they of the judicial character that they never wait to hear both sides, they never stop to exhaust the sources of information, most of them serve a party, they say what they please of everybody as freely as they would do if they were speaking to bosom friends in the confidence of the fireside, they are under no restraint, legal, moral or social, and they gratify their private feelings at will, subject only to their hope to increase or fear to diminish their circulation.

Our political freedom has begotten personal and social recklessness. People appear to feel no restraint and no sense of responsibility, and they move on with an apparent disregard of consequences. We see this in private business and in public administration; in traveling by land and sea; and no one who has sailed in American and in English ships, but must have observed how superior to us in discipline are our cousins over the water.

It seems to be almost a point of honor with an editor that what he has once published he will never retract, save with comments and qualifications which are really an aggravation of the original wrong. Point of honor, indeed: as if true honor did not require the righting of a wrong as speedily as possible! In how few instances has it occurred that an editor, proved to have published a libel, has been willing to recant and apologize, as a gentleman would in the ordinary course of private life. Yet why should he not? Does the publishing of a newspaper give the publisher a greater right to say what he pleases of another, than the same person would have, in a private parlor, before a select company of gentlemen?

It is easy to see where lies the fault, and what is the remedy. We are all in fault, the journalist first, in doing the wrong, and the rest of us in submitting to it. The greater the means and opportunity to injure, the stronger the obligation to guard

against the possibility of injustice. Every man in his sphere has the power to do an injury. A lawyer has many opportunities to injure those whom he dislikes; he can drag their names in on many occasions, and fling a slur upon them before many audiences; but, if he should make such use of his opportunities, he would be pronounced unworthy the society of gentlemen. So an editor, who from spite or other unworthy motive drags a name into his columns to asperse it, is false to the plainest of his duties. The cowardly ruffian who, concealed behind his types, throws anonymous libels at his betters, is as execrable a wretch as lives upon the earth.

But we, that is, the rest of the community, have ourselves to blame for not putting a stop to the abuse. We can do so by the law in part, and for the rest by public opinion. Our law of libel, it must be confessed, is imperfect, and our administration of it still more so. It is generally assumed that the truth of a story is a sufficient reason for publishing it. The assumption is wrong. A German gentleman lately put this question to an American, "Is it true that, in America, any person may publish what he pleases of another?" and received for answer, "Yes, if the publication be true." "Then," replied the German, "I do not wish to live in your country." There are many cases where the truth should not be published. The secrets of families and forgotten scandals are among them. If a worthy citizen fall into contention with his neighbor, the latter has no right to publish, no matter how true, that his enemy's father was once in prison for a criminal offense. The publication of the truth under such circumstances would be an outrage upon the individual and upon society. Or suppose the citizen to have been betrayed in his youth into youthful indiscretions, the publication of them would be a like breach of morals and of decency.

The letter of our criminal law, it is true, forbids it, but that is a dead letter. It does indeed require that the matter charged be not only true, but that it be "published for good motives and for justifiable ends." But who can remember when a libeler has been punished, after proving the truth in a defamatory matter? When that is done, further inquiry is practically abandoned. Hence the derision with which the phrase is in-

variably treated, "The greater the truth the greater the libel." Nevertheless, it was a true phrase, in the sense in which it was uttered. The libel consists in the defamatory matter; the truth is received, not as a disproof of the libel, but a justification of it, not by itself, but only when a justifiable motive and a good end are also proved. In practice, however, as we have said, these qualifying words, concerning motives and ends, might as well have been omitted, for any protection they afford to the right of reputation.

The graver the offense imputed, the stronger is the reason for not imputing it, unless the good of society requires the truth to be known. The right of the individual is the concealment of whatever may do him an injury; and this right gives way only when a greater right of society intervenes. We will suppose another case, stronger than the two already supposed. Imagine the case of a boy who commits, in the heedlessness and temptations incident to boyhood, the crime of larceny, for which he is convicted and punished; he expiates his offense by his punishment, and he comes out of prison repentant and reformed; the law is satisfied, society is, or should be, satisfied, since it has expressed in its laws the penalty for the transgression; and it is a high crime against him, and against society and the law, to bring the accusation again to remembrance, except, perhaps, on some rare occasions, when a greater good and a higher law require it.

Our law sometimes preserves a formula, which, however significant once, has lost its vitality. One of these respects what is called the liberty of the press. Because long ago, in their English homes, struggling for liberty and life against the prerogatives of princes and the divine right of anointed kings, our forefathers asserted and maintained their right to criticise freely the measures of government and the acts of public men, therefore we, mistaking their danger for ours, renew in each successive constitution the same protest for free speech and a free press. Our danger is from another quarter; the tide here is setting in the opposite direction. If a constitutional provision on the subject of the press is needed at all, it is for its restraint instead of its protection. The right of reputation should be declared one of the fundamental rights of men, and

the duty of the Legislature to protect it by adequate laws asserted and enforced. Instead of this, we have set up an historical monument for a constitutional bulwark.

We do not forget that the Constitution does at least imply that protection is due to character from the abuse of the press, when it declares that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press." It is the failure to make the responsibility effective that we are complaining of, and the means of making it so that we are considering.

The enforcement of this responsibility is prevented by several causes. One of them is the unanimity required of juries. They have in civil cases to pass on the various questions of publication, justification, and damage, including in the last, probable cause. Here is such scope for disagreement, that a suit for libel becomes an ordeal which few prudent persons would be willing to pass. The case of *Opdyke against Weed*, tried several years ago, is an illustration. There was a gross libel, without any justification, upon a worthy citizen and incorruptible magistrate, and yet, after a long and laborious trial, the jury disagreed upon the amount of damage, and were discharged without a verdict. It would be difficult to find a case more strongly requiring the punishment of a libeler than that, but, since the prosecution failed in that instance, who can hope for a better fate, in resorting to the law for the vindication of character?

The fact is palpable that in this country there is practically no adequate protection for character, deplorable as the fact may be. The right of reputation is one of the most valuable rights of man in civilized society, we had almost said the pivot of them all. And whenever, in any country, this right is not protected, no other right will be protected long. Those who use the press for calumniation are therefore the worst enemies of society, and our first duty as citizens is to punish and restrain them.

What adequate means of punishment and restraint can we find? This should not be a difficult question to answer, since

it has been answered in other countries. Everywhere else in the world reputation is protected. It is only here that it has lost all protection. With the example of success elsewhere in comparison with our own failure, it would be a reproach to our intelligence and spirit if we did not find a remedy, appropriate to our circumstances, and conformable to the general scheme of our laws.

If the law of libel could be enforced, as they enforce it in England—for their law, in this respect, is nearly the same as ours—there would be little need to change it. But, unfortunately, this branch of the law, like some others, is executed here with a laxity in surprising contrast with its execution there. Their Judges are more strict and more independent; their juries are more select; and they do not allow the newspapers to interfere in the administration of justice. The same general causes which make the laws against other crimes to be less rigidly enforced, weaken also or prevent the enforcement of the laws against the crime of libel. Our laxity is the fault of Judges, juries, and, it may be added, of the general body of citizens. And if new laws are needed, as we think they are, it is because the laxity of administration, allowed and encouraged by public opinion, needs to be corrected by new legal provisions.

Some of these provisions are plainly to be perceived. We have already mentioned the unanimity required of juries as one cause of the present difficulty. We would, therefore, allow a verdict by a given majority, say two thirds, of the jury in a civil action for libel. We would provide for a speedy trial, by giving, if need be, a preference upon the calendar of the courts; and in order to obviate the inconveniences arising from disagreement upon the amount of damages, we would fix a sum, by way of penalty, to be given in all cases of ascertained and unjustified libel, unless the jury should agree upon a larger sum. We would never allow the defendant to attack the plaintiff's character, except in strict justification of the libel. The practical result of a civil trial for libel nowadays is a reversal of positions, and a trial of the plaintiff upon his general character, instead of a trial of the defendant for libel. And we would further provide by law that a responsible individual publisher

of every newspaper should be registered, and that the name of the writer should be published at the foot of every article reflecting upon character. The practice of creating corporations for the publication of newspapers, latterly adopted, makes it all the more important to provide for ascertaining and enforcing personal responsibility. Take, if you please, any journal published by a corporation. If a libel upon somebody should appear in its columns it might be difficult to find the right person to indict should a criminal prosecution be designed; or, in case of a civil action, those considerations of motive and guilty intent, which would affect the question of damages in an action against an individual, would be wanting in an action against a corporation.

Two of these suggestions were made to the Legislature of New York, in 1865, by the Commissioners of the Code, in these terms: "The law of libel has passed in the last hundred years from one extreme to another; from excessive severity to excessive laxity. The abuse of the freedom of the press, not only in the wantonness of its attacks upon public men, but in its assaults upon private citizens, has become so great, that a remedy for the evil must be sought, or violence will take the place of law. The license in which this freedom has degenerated leads, not only to the frequent invasion of private rights, but to the corruption of public morals. If the commissioners had been certain of the true remedy, they would have proposed it in the text of the code. They would venture only to suggest that, a more certain punishment for wanton or careless defamation being needed, a remedy may perhaps be found in affixing to it a penalty to be recovered in every civil action for libel, in addition to the damages which the jury may find. This would, at least, render it unsafe for libelers to rely upon the caprice or prejudice of juries as the means of escape with nominal damages. Requiring the name of the writer to be signed to every personal article might also have a salutary effect. If the Legislature should think these provisions desirable, two sections, like the following, would answer the purpose:

§ —. "Any article published in a newspaper containing matter which would be libelous if it were false, must be signed by the writer, and his



name must be published at the foot of the article. A violation of this section is a misdemeanor."

§ —. "In every civil action for libel, if the plaintiff recovers a verdict, he shall be entitled to judgment against the defendant for — dollars as a penalty, in addition to the damages found by the jury, and the costs of the action."

We have said that our law of libel is much like the English. We received the same by inheritance, but we have made a few changes, not always for the better, sometimes very much for the worse. One of them is in the law of contempts. Comments which may tend to affect pending suits are in England strictly forbidden and summarily punished. We, by failing to punish, allow them, to the manifest detriment of justice, and the debasement of the press. We have changed this law most unwisely, and shall be obliged to retrace our steps, for such comments, or indeed any comments upon the merits of a cause depending in court, are incompatible with an impartial and effective administration of justice, and justice is the first interest of every civilized community. It will not suffice, however, to rely on the law alone. There must be a public sentiment behind the law, stimulating the authorities to the performance of their duties, and inflicting social penalties also upon the transgressors. In the intercourse of private life, the liar is discredited and shunned; but the man who says what he knows to be untrue is but a slight remove from him who asserts for facts what he does not know, or publishes as true what he has not, upon examination, the most certain reasons to believe. An unjustified libel is a great crime, and society should treat the libeler as a criminal, according to his deserts.

One would suppose, from the license of our press, and the failure to restrain or punish it, that there prevailed here an indifference to character, or a general belief that newspaper abuse did not affect it, or universal depravity among the people. Neither the first nor the last is true; and, though there is a prevalent notion that the calumnies of newspapers cause little harm, that is not a reason why they should continue unrestrained. For no result is more certain than that universal evil-speaking will lead, sooner or later, to universal evil-doing.

The condition of the press is therefore a subject of general concern. It affects not only the maintenance of individual rights, but the good name of the commonwealth. Nothing has done more to bring discredit upon this country than the conduct of its newspapers. The defamers in their columns not only defame each other and whomsoever else they please, but they defame us all. No wonder that we have fallen into disrepute in the world. Not one evil thing that is said of us abroad is worse than that which our editors say of us at home. If we were required to prove our public servants to be everywhere corrupt and our people to have sunk into general debasement, we should need to do no more than display any day's issue of the journals, for they teach us to think evil of every public and almost every private person.

If this is not a pleasant picture, it is nevertheless a true one. It need not continue to be true—that is to say, it can be changed by resolute and united effort. We have said that the newspaper has two offices to perform, one to publish news, the other to give a running commentary. Of the two offices, one is here performed better and the other worse than it is performed in any other country. In collecting and laying before their readers news from all parts of the world, our daily journals are unequaled and unapproached. In the pursuit of it they traverse sea and land, penetrate the remotest regions, and discover the most hidden secrets. No dangers appall and no hardships deter them. Would that the ambition of the journalist would raise the other office to the level of this in its performance, free the comment from the impotence and personality with which it is now afflicted and disfigured, and make it in richness and vigor a fit complement to the wealth of news which his journal spreads before its readers! This would be an object worthy of his highest ambition. A newspaper occupies ground that nothing else can occupy. No other agency can reach so many persons in so short a time. Sheets, that are rolled from the presses of New York each morning, are carried as fast and far as wheels can bear them. They are read by millions of readers, upon whose minds they make an impression, which, however feeble and transient, will leave some trace, even after the correcting processes of truth and time. The calling of the jour-

nalist is therefore one of great responsibility. Though it be not classed with the learned professions, it requires for its due exercise an amiable temper, a clear head, a true heart, and a facile pen. It has three drawbacks, however, and must always have one, which will tend to prevent its attracting to itself the highest talent of the country. One is the necessity of writing so much on the spur of the occasion. This must inevitably beget immature thought and careless composition. No advance in journalism can obviate this, because the number is limited of subjects which can be foreseen as likely to come within the journalist's field of vision. The other two, though incidents of journalism now, may not always be in the way. One is the anonymous and the other the self-extolling element. A gentleman instinctively shrinks from concealment, and the practice of writing anonymously must always detract, to a greater or less extent, from the self-respect of the writer. An anonymous accusation is abhorred of all men, for it is an instinct that a person accused shall be confronted with his accuser. An anonymous letter is the weapon of a coward. And, as for the puffing, who can imagine any respectable member of a liberal profession resorting to it? The barristers of Ireland have just been scandalized because one of them has endeavored to get business by advertising.

We have thus endeavored, though in a manner altogether imperfect, to discuss the present condition of journalism in this country, to explain its true office, trace the causes which have made so great a difference between the newspapers of other countries and our own, and which have rendered so many of ours common and personal, and to set forth withal the need, and, by more stringent laws, a more exacting public opinion, and higher talent, the means of making them more reputable and more useful.

Before the change comes, and so long as the press continues to be what it is now, what should one do who is assailed by it? This is a question which a great many persons have to consider. To sue is not to be thought of, as the law now stands and is administered. The libeler will laugh at you and berate you. The laws of your country afford you no redress, and the Legislature of to-day is afraid to enact any that

will. To call upon the libeler, flatter him, explain to him, and bespeak his recantation, would prove you not only deserving his calumny but his contempt also. To reply in the columns of the paper itself might lead to interminable controversy, because a repetition of the falsehood would be sure to follow the reply, or such an excuse for it as to redouble the injury of the first publication. Two courses only are open to you. One is silence and indifference. The other is to strike back, not by defending yourself, but by attacking your assailer. The former course appears to us the wiser one. The injury to you will fade away sooner or later. "Neglected calumny soon expires," says Tacitus, and, though he did not live in the days of newspapers, we are not sure that he would not have expressed himself all the more strongly, if he had observed the discredit into which newspaper comments have fallen. If some old women in petticoats or in pantaloons think the worse of you for the calumny, comfort yourself with the reflection that they do not, after all, much affect the course of this world. But if, rejecting our advice, you make up your mind to strike back, waste no time on the editor. He may be an adventurer, hired for the time, transient and irresponsible. Do as the friends of Sir Walter Scott did for a libel in their day, seek out the proprietor and strike him. He is generally of the class that live in glass houses. Why such persons should be attracted toward newspapers for investment is an ethical problem, not difficult to solve. Striking thus, you will probably reach the root of the evil for the occasion. Then wait in patience for the time, which is sure to come, when the daily press will be delivered from the power of him who loves scandal, or "whosoever loveth and maketh a lie," and will take its proper place, and perform its true functions, as a teacher and leader of the people.

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## RESPONSIBILITY OF AMERICAN LAWYERS FOR THE GOVERNMENT OF THEIR COUNTRY.

Address to the graduating class of the Albany Law School, May 25, 1878.

GENTLEMEN: One of the most pleasing and instructive books lately published is the little work of the Duke of Argyll, on "The Reign of Law." His purpose was to show that every living and moving thing came from design, and lived and acted according to a law of its Creator. His idea of law was akin to that of Hooker, who said that "her seat is the bosom of God, her voice the harmony of the world." This is not, however, the idea of law which I would present to you at this time; our profession is concerned, not with the reign of law, in all things visible and invisible, not with the harmony of the universe, but with law framed by human wisdom and administered by human skill.

Even so limited, the profession, in its scope, embraces all the concerns of human society; in the knowledge it requires, it extends to every branch of learning that can possibly in any controversy be brought into discussion; and, in respect of morals, it demands a degree of self-control, a constant sense of responsibility, and a consciousness of unceasing obligation, never less, and often greater, than are demanded of any other private citizen.

These duties and relations form, however, too large a topic for one discourse. Of your professional relations to your clients, to the courts, and to the general public, I shall therefore have little to say. That you are to be faithful to clients, frank with the courts, and just in all your relations with your fellow-men, is enjoined by the law, human and divine. That you are, in short, to be honest lawyers is taken for granted, and you would be apt to suspect the motives of any one specially demonstrative in inculcating the virtues of honesty. The people have seen so much self-seeking in the name of reform; so many knavish faces hiding, or attempting to hide, behind honest masks, and clamoring after those who have outstripped

them in the race of life, that they have come almost to regard professions of virtue as so many confessions of vice, and the loudest moral reformers as performers in masquerade.

Of the purely professional relations of lawyers, I do not know that fitter words were ever spoken than those of the Attorney-General and Chancellor of the Exchequer of England, at the dinner given at the Middle Temple by the English bar to M. Berryer, of the French bar, on the 8th of November, 1864. Sir Roundell Palmer, then Attorney-General, now Lord Selborne, presided, and said in his opening speech: "I rejoice in seeing around me so many gentlemen of our noble calling—a calling which vulgar minds frequently misrepresent and under-estimate, but upon which in no small degree depend the rights and liberties both of individuals and nations. It is its high privilege and duty to supply the just weights and balances of the scale of justice, by laying before justice all the considerations which ought to weigh on every side of every question, to stand forward for the weak and miserable, and upon great occasions, when public liberties are in question, to stand forward undaunted and assert the public right." Mr. Gladstone, then Chancellor of the Exchequer, said: "I have always felt that the bar is inseparable from our national life, from the security of our national institutions; but never, so long as I looked at England alone, did I understand the full extent of its value. Some years ago it was my lot to be witness of cruel oppression in a country in the south of Europe. There the executive power did not merely break the law, but deliberately supplanted it and set it aside, and established in its stead a system of pure arbitrary will. To my astonishment, I found that the audacity of tyranny which had put down chambers and municipalities, and which had extinguished the press, had not been able to do one thing—to silence the bar. I found in the courts of justice, under the bayonets of soldiers—for they bristled with bayonets—in the teeth of power, in contempt of corruption, and in defiance of violence and arbitrary rules, lawyers rising in their places and defending the cause of the accused, with a freedom and fearlessness which could not have been surpassed in free England, or even by M. Berryer himself." Who, remembering these words or thinking these

things, would not laugh at the pop-guns of Bohemians who would presume to dictate whom he should appear for and whom defend? The glowing sentences of Palmer and Gladstone were spoken of lawyers as they are and have ever been in free England, and as they must be in every country which has the reality, or keeps up even a show, of government according to law.

But in America the profession has even a wider scope and larger duties. This arises from two causes: one, the absence of privileged classes; and the other, the existence of written constitutions. These constitutions are mainly the work of lawyers; their interpretation and application are exclusively their work. Hence it follows that the lawyer who, in every country of law, stands in such close relations to liberty, order, and government, stands in this country in still closer and peculiar relations. For the sake of discrimination I will call these relations political, in distinction from those which are purely professional. These relations concern society it is true, but society in its organized form. The opportunity of American lawyers to correct abuses in the government of their country and to ameliorate its laws, and the duty of using the opportunity, are, then, the topics of this discourse.

I address myself directly to the members of our profession, and especially to the young gentlemen who are to-day entering it. The rest of this audience gathered, I may presume, by reason of interest in the graduating class, will excuse me if I assume that their interest in the future of its members will make them willing to listen to anything intended for their friends. I shall, then, not hesitate to speak to those who are about to exchange the study for the practice of the profession, of the part which, in my view, American lawyers should take in the government of their country. I do not speak of the duties of citizenship generally, because I am not speaking to the general body of citizens, but to those among them who by choice or circumstance are set apart for the law.

And when I speak of the duties of a lawyer as being different from those of another citizen, I do not by any means assume that he has greater legal rights. His vote counts one, and no more. But I assume that his opportunities are greater,

and, for reasons which I will explain, that he can, and therefore should, do more, than if he were in any other calling, for the promotion of order and liberty among his countrymen.

Order and liberty—these two words express the end and aim of human law; order, with as much liberty as is consistent with order. All the functions of government, legislative, executive, and judicial, are, or should be, exerted for these ends: the legislative, that it may prescribe the rules by which order and liberty are to be best preserved; the judicial, that it may apply these rules to the facts of particular transactions; and the executive, that it may execute the will of the Legislature, as expressed in the laws and applied by the Judges.

The superior opportunities of lawyers to assist in the promotion of these ends will be apparent upon the slightest observation. Their studies, more than those of other men, lead them to examine the structure of their government, the relations of the different parts to each other, and the principles which lie at their foundation; they of all men know best the political rights and duties of the people; the preparation for their profession brings every part of knowledge within the range of their inquiries. Thus much is to be said of the knowledge and training with which they must have fitted themselves for the practice of their profession, if it is to be practiced in its highest departments. Then, in actual practice, they represent their clients before the courts, in respect to all that is dearest in life, the rights of person and property and the domestic relations; they are consulted and trusted in the most important and the most delicate concerns; they are the depositories of innermost secrets, and their advice is the guiding and restraining influence that moves, with a scarcely observed but constant pressure, the daily currents of human affairs. And, in addition, they have in this country, as I have already said, the peculiar function of bringing to the test of written constitutions the acts of all public servants, in all the departments of government.

Functions so great and duties so important draw after them responsibilities of like proportions. Though his vote counts one, his influence may count for thousands and tens of thousands. Other things being equal, he has greater opportunities



than others for his influencing the votes of his fellows, and for affecting the action of public men.

Every voter performs or should perform part of the functions of government; and as he performs them well or ill, so, to the extent of his part in them, will the government be good or bad. It may no doubt happen, on rare occasions, that good men by accident choose a bad representative, or bad men a good one. But as a general rule the representative will fairly express the wishes, the tastes, the thoughts of those who select him. If he is selected by the whole body of voters, he will represent the whole body; if he is selected by a part, and the rest vote for him as so many dummies, he will represent, not the dummies, but the part, large or small, that selected him. Leaving, then, the dummies aside, and looking only at the living, thinking, selecting voters, we may regard them as practically the sovereign people, and assume that all officers—presidents, governors, legislators, judges are their agents and servants, and execute their sovereign will.

There are three classes of nominal voters: those who, having the right of suffrage, do not exercise it; those who exercise it, but do so as the tools of others; and those who exercise it as intelligent and free agents. Of the first, it is enough to say that they act as if they were already disfranchised; and, of the second, that they deserve disfranchisement. They who will not fulfill the duties should forfeit the rights of citizenship. They are of no account, and may be left out of the calculation. It is the third class, the company of electors exercising the right of choice, and really naming the public agents, that is the real source of power. That class of electors, and the agents whom they directly or indirectly appoint, it is the privilege and the duty of lawyers, more than other men, to influence and persuade.

Having advanced thus far, we pass, by an easy transition, to a contemplation of the actual condition of the country, and a consideration of the consequent duties and responsibilities of lawyers, measured by the standard already given. That condition is not so good as I wish it were. This is the season, I know, of centennials and of boastful congratulations, which, however well founded in general, are sometimes extravagant.

The picture is not all bright ; there are shadows and dark spots. These it will do us no harm to look at upon occasion. Nothing is gained toward healing a sore by covering it out of sight. The people of this country have their good or evil fortune in their own keeping ; they are disposed toward good government ; it is their interest to have it ; and they will have it, if they see how it can be had, and are not misled or betrayed. But we must first disabuse our minds of the pernicious notion that abuses will cure themselves ; and of that other notion, hardly less pernicious, that the machinery of our government is so simple that it is slow to get out of order. This machinery is not simple ; on the contrary, it is extremely complex, and requires constant supervision. The principles which govern it are no doubt simple ; so are the principles which govern the most complicated engines, but the engines themselves are none the less complicated.

Burns exclaims, in a witty poem, that we have all read :

“ Oh, wad some power the giftie gi’e us  
To see oursel’s as ithers see us !  
’Twould frae monie a blunder free us,  
And foolish notion.”

Let us see what others sometimes say of us. Here is an extract from the news telegraphed from England to our newspapers on the 5th of the present month :

“ THE LEXINGTON CENTENNIAL.

“ *The English criticism of Mr. Gladstone’s Letter.*

“ LONDON, Wednesday, May 5, 1875.

“ The ‘ Standard ’ severely criticises the letter of Mr. Gladstone, read at the centennial celebration of the battle of Lexington. It remarks that the habit of toadying to Americans is discreditable in English public men and journalists. The results of the republican experiment in the United States are corruption of public life, extinction of public spirit, oppression of the minority, disgust of honorable men with politics, and the transfer of the Government into the hands of corrupt, unscrupulous, and ignorant men.”

This is, I know, the language of an enemy. The “ Standard ” is the organ of the High Tory party in England, and

would of course publish anything it could to the disparagement of republics. But the opinion of the Tory organ is, I am sorry to say, the opinion of a great many people who are not Tories. A pretty close observation of different countries has convinced me that the general opinion of thinking men, all over the world, is, that our public service is sadly demoralized. I do not admit the truth of all the imputations. The exaggeration is great and manifest to Americans. But the fault of the exaggeration is very much our own. Every one of the charges could be proved by the American newspapers, if they were to be accepted as witnesses. None of the imputations thus telegraphed back to us from the other side of the Atlantic is without support from the printed sheets spread upon our tables every day of our lives. If an American abroad were to deny the truth of the "Standard's" accusations, and the accuser, for proof, were to gather the files of the American newspapers, for any month of the last five years, the American would be driven to deny the competency and trustworthiness of the evidence.

Apart from the newspapers, however, there is evidence before our own eyes of much that is wrong. It is not my purpose to go into details. That any one may do for himself. My object is to call the attention of lawyers to the fact of their great responsibility for this wrong, to the importance of grappling with it and overcoming it, if we would preserve our free institutions, and to that end the necessity of resorting, not to petty or temporary expedients, but to fundamental principles, and the immutable laws of human society.

What is the significance of the astounding phenomenon that, while in all the other sciences and arts of life we have advanced with a progress beyond all history, and, beyond even the dreams of the wildest dreamer, have multiplied the numbers and the wealth of our people, turned the wilderness into fruitful fields, built great cities, and girdled the sea and the land, we have not advanced in that greatest of all sciences and arts, the science and art of government, but have actually gone backward? Why is this movement retrograde while all others are advancing? Whatever may be the cause, we can not divest our profession of a great share of the responsibility. We know that fidelity to all official trusts, and as few of them as possible,

is the fundamental maxim of republican government; we know that the unnecessary multiplication of offices is at once the cause and the sign of decay in public virtue; we know that the maintenance of the Federal and State governments, in the plenitude of their respective powers, is our only guarantee of liberty and order. These are fundamental principles, with which every lawyer must be acquainted. His opportunity to influence the public servant and the voter is exceptional, as I have shown, and his responsibility is commensurate with his opportunity.

I have spoken of the science and art of government as the greatest of all the sciences and arts. Perhaps I might better have said the science of government, theoretical and applied. Of all knowledge and all art, this is the most important and most neglected. Read the debates in Congress and the State Legislatures; read the articles of the magazines and newspapers; read the resolutions of political conventions, and say in how many do you find the great subjects that have agitated the country for the last fifteen years, treated as they would have been treated by those who in just reverence we call the Fathers.

Take for example the question of the suffrage. To give this right or privilege, whichever you may call it, to every human being of mature age, may be a good thing in this country, or it may be a bad thing. That question I do not discuss. But I do insist that the question should be treated, not as one of temporary expediency, or of mere partisanship, but one of good or evil government for the whole people, or the greatest number of the people.

The question who shall vote in the elections is but another form of the question who shall govern the country. Now, though it may be true that, having regard only to an imaginary social compact made at the beginning of society, one person has as much right to govern as another, yet that right is gone as soon as society is organized, for then the question becomes one of public safety—that is, the safety of all. If, for example, a ship's company of five hundred adult persons were cast upon an uninhabited island, and had there to organize a new community, I am not aware of any principle which would

give to any one man or woman a right to participate in the organization more than another, laying out of view the rights of heads of families, if there were any there. But I do see a principle, which, after the organization of the social body, would admit or exclude new-comers, not according to their original equality as men and women, but according to the best government of the existing state.

We may apply the same principle to our own institutions. At the Revolution the people of each of the thirteen States were, to a great extent, homogeneous, but the suffrage was hardly anywhere universal. When the question arose whether the suffrage should be made universal among such a population, the answer should justly have depended, and, for aught that I can say, did depend, solely upon the other question, whether the good government of the whole community would be promoted or impaired by it. And when the further question arose whether incomers from foreign lands and the emancipated slaves should be admitted to the suffrage, the answer should have depended upon the same principle, as to the general good; and that general good might possibly have been promoted by one class of new voters, and not by another. Now I repeat that I do not mean at all to enter into the question whether the admission of foreigners and emancipated slaves was good or bad in itself; but I do mean that, considered as a question of political philosophy, it should have been decided, not upon the doctrine of the equality of men, but the exigencies of society. Any man who should preach universal suffrage on the banks of the Ganges would be treated, and justly treated, as a lunatic. With it, in the present condition of India, no man's life or property would be safe for an hour. In short, the question of the suffrage in any country depends upon the nature of the government, and the capacity of the proposed voter to take part in it. If he be a capable and safe depositary of power, even of that moderate share which comes of voting, then he should be admitted to vote; otherwise, he should not be admitted.

Then the question of the suffrage, in its application to the government of cities and towns, may be quite different from the question of suffrage as applicable to the whole State. These

municipalities are corporations, the chief object of which is the protection and administration of property for the convenience of the citizens; as, for example, the paving, cleaning, and lighting of streets, the building of sewers, the supply of water, the prevention or extinguishment of fires, and a hundred other objects of municipal government. For these reasons, I insist that the true theory of municipal government requires a double representation—one of property, and the other of person. They who own a bank have the management of it; so they who own the property of a town should have a greater voice in its disposition than they who own none of it. Taxation without representation was the complaint of our Fathers. What was the meaning of that complaint? It was that they who pay the taxes should lay them. As things are now going on in this country, municipal taxation will soon become confiscation. I know a town where a vote in the town-meeting for subscribing to the stock of a railway was carried by those who were not tax-payers against those who were.

The same general principle which applies to the suffrage—that is to say, the greatest good of the greatest number consistent with the rights of all—applies also to every new division of power. In respect to the admission of new States, or to the acquisition of new territories, it may be, as I think it often is, lost sight of; but it is, nevertheless, essential, and the neglect of it will sooner or later come back to our discomfiture. Every new State, with an inadequate population added to the Union, disturbs the natural and just balance of political power; yet, how many members of Congress thought of this, when at the last session they voted to admit one Territory and rejected another? A vote to admit as a State a Territory having a population less than one of our counties, is a vote to make the county equal in one branch of Congress to the whole State of New York. The annexation of new territory is, in some respects, a pleasant thing to think of. We like to see our flag waving over new lands, but we are apt to forget that we can not govern without being also governed. It is very well for us to talk of governing Mexicans, Cubans, and Dominicans, but, for my part, I am free to confess that I do not like the idea of their taking part in governing us.

Turning from these political topics, let us look at some that are not so much political as social. Look, for instance, at one suggested by what is passing now before our eyes: I mean the question of a public or private trial in cases of scandal. Why, in the name of all that is reasonable, should such a trial be public? The publicity of courts of justice is enjoined as a rule, not for the entertainment of gossips; not for the indulgence of curiosity; not because the public has any interest in the details of private affairs, but because judges will become tyrannical and corrupt if they are not watched. The majority of citizens have no greater interest in the publicity of courts than in that of Legislatures; but in respect to these there is provision for private sessions on some occasions, it being prescribed by our State Constitution that "the doors of each House of the Legislature" shall be kept open, "except when the public welfare shall require secrecy." There may be things passing in courts, as well as in Legislatures, that require secrecy, and they should be kept secret.

Moreover, I insist that, even when the doors are open, and any one may enter to see and hear what passes within, there is still a limit to the right of publication and comment. The claim, sometimes put forth, that whatever passes in the courts may be at any and all times freely published and commented upon, is, in my judgment, utterly indefensible. The theory of a trial is subverted by it. That theory assumes that judges learned in the law, a trained bar to assist them in seeing "every side of every question," and a jury to decide questions of fact, are set apart from the rest of the world for the purpose of deciding the case. If "the rest of the world," nevertheless, are to participate in the decision, the judges, the lawyers, and the juries might as well be dispensed with. Of all methods of trial, that by newspapers would be, if it were established, the least reliable and the most unsatisfactory. In every country of the world but our own, comments upon cases in court, so long as they are depending, designed, or fitted to affect the minds of either court or jury, are strictly forbidden. It should be so here. It will yet be so, because the highest need of society is the administration of justice, and whatever interferes with that will, sooner or later, go down. One of the

first duties of the lawgiver, and therefore one of the first inquiries of the lawyer, should be, how to regulate or restrain the publication of reports of trials, whose details tend to the depravation of morals, and how to prevent the disturbance, by outside influences of any kind, of the proper functions of those who are charged by the State with the administration of the laws.

But it is impossible to pursue this train of thought further. Enough has been said, however, to make apparent the importance and necessity of lifting politics out of the degradation into which they have fallen. We must begin with ourselves, by taking to heart the lessons we have learned from the records and the traditions of our profession; by studying anew the history of free governments and the fundamental maxims of our own; and by exposing, denouncing, and combating with unshaken constancy the abuses of the times, no matter who may defend them, or wink at them, or profit by them, or what criticism or denunciation of ourselves we may provoke. Let us have the courage to utter unwholesome truths, if they are worth uttering, regardless of their unpopularity. And when we have awakened the people to a sense of the false security in which they are resting, then, and not till then, may we say, "ALL IS WELL."

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## LAW AND EQUITY.

Letter to the "Albany Law Journal," December 28, 1878.

*To the Editor of the Albany Law Journal.*

SIR: The present Constitution of this State declares that "there shall be the existing Supreme Court with general jurisdiction in *law and equity*"; and the Constitution of the United States, that the judicial power of the Federal Government "shall extend to all cases in *law and equity*, arising under this Constitution, the laws of the United States," etc.

What do these expressions mean? Do they refer to an existing classification for the mere purpose of description, or are they intended to perpetuate the classification? The ques-



tion has at least an historical interest, for the answer will show the tenacity of prejudice and what obstacles they have to surmount who assault ancient abuses.

In our Court of Appeals, Mr. Justice Samuel L. Selden, delivering an opinion, asked,\* "What are the distinctions between actions at law and suits in equity?" and proceeded to answer:

"The most marked distinction obviously consists in their different modes of relief. In the one, with a few isolated exceptions, relief is invariably administered, and can only be administered, in the form of a pecuniary compensation in damages for the injury received; in the other, the Court has a discretionary power to adapt the relief to the circumstances of the case. By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them. The Legislature may, unless prohibited by the Constitution, enact that no Court shall hereafter have power to grant any relief, except in the form of damages, and thereby abolish all suits in equity; or that all Courts shall have power to mold the relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class.

"To illustrate by a single case: they may provide that, when a vender of land, who has contracted to sell and received the purchase-money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for specific performance, but it is clearly beyond the reach of their powers to make those two remedies the same. . . . It is, in my judgment, clear that the Legislature has not the constitutional power to reduce all actions to one homogeneous form: because it could only be done by abolishing trial by jury with its inseparable accompaniment, compensation in damages, which would not only conflict with Article I, section 2, which preserves trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable, or by abolishing trial by the Court, with its appropriate incident—specific relief, which would destroy all equity jurisdiction and convert every suit into an action at law. . . . Thus it will be seen that section 69 of the Code is an attempt to exercise a power which the Convention, in framing the Constitution, expressly refused to confer upon the Legislature."

This was in 1856, but the opinion went beyond the point decided. Two years later a case came before the Court, in which it was found necessary to decide the precise question, whether legal and equitable relief could be had in the same

\* *Reubens vs. Joel*, 13 N. Y., 493.

action.\* The opinion of the Court was delivered by Mr. Justice Johnson, then Chief Judge. He said :

"In this case the question arises whether, in an action to recover specific real property, the plaintiff may attack a deed under which the defendant claims title as well upon grounds which, under the former divided jurisdictions of law and equity, were cognizable at law as upon grounds which were properly cognizable in the Court of Chancery. It is contended that the Legislature does not, under the Constitution of 1846, possess the power to authorize such a case to be determined in a single suit. The provisions relied upon are sections 8 and 10 of Article VI, the first of which is, 'There shall be a Supreme Court, having general jurisdiction in law and equity'; and the other is, 'The testimony in equity cases shall be taken in like manner as in cases at law.' The argument based upon those provisions is, that distinct jurisdictions at law and in equity are recognized, and that this recognition imposes upon the power of the Legislature the restriction to preserve distinct methods of enforcing legal and equitable rights. The language of the provisions does not, as it seems to me, either directly or by any implication, lead to the result contended for."

In the Supreme Court of the United States, prior to 1873, opinions, more or less similar to that of Mr. Justice Selden, had been expressed, in respect to the analogous provision of the Federal Constitution; once by Mr. Justice Story,† then by Mr. Justice Davis,‡ and afterward by Mr. Justice Bradley. | In Thompson's case it was said that :

"The Constitution and the acts of Congress recognize and establish the distinction between law and equity. . . . And although the forms of proceedings and practice in the State Courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

In 1873, however, the Supreme Court found that the frequent cases coming up from the Courts of the Territories, where the New York Code had been adopted, made it necessary to reconsider the question.

Thereupon Mr. Justice Bradley, delivering the judgment

\* *Phillips vs. Gorham*, 17 N. Y., 270.

† *Parsons vs. Bedford*, 3 Pet., 448.

‡ *Thompson vs. Railroad Companies*, 6 Wall., 187.

| *Dunphy vs. Kleinsmith*, 11 Wall.

of the Court, admitted, with a frankness which did him honor, that a mistake had been made in the previous cases.\* I will quote largely from his opinion, as a model of clear statement and manly concession, which I wish were more followed. He said :

"The only errors assigned are based on the intermingling of legal and equitable remedies in one form of action.

"Such an objection would be available in the Circuit and District Courts of the United States. The process Act of 1792 expressly declared that in suits in equity, and in those of admiralty and maritime jurisdiction, in those courts, the forms and modes of proceeding should be accorded to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, subject to such alterations and additions as the said courts respectively should deem expedient, or to such regulations as the Supreme Court should think proper to prescribe. The Supreme Court, in prescribing rules of proceeding for these courts, has always followed the general principle indicated by the law. Whether the Territorial courts are subject to the same regulation is the question which is now fairly presented.

"In the case of *Orchard vs. Hughes* a majority of this Court was of opinion that the Territorial courts were subject to the same general regulations in equity cases which govern the practice in the Circuit and District Courts. That was the case of a foreclosure of a mortgage in the Territorial court of Nebraska, and the court, under a Territorial law, not only decreed a foreclosure and sale of the mortgaged premises, but gave a personal decree against the defendant for the deficiency. We had decided, in *Noonan vs. Lee*, that under the equity rules prescribed for the Circuit and District Courts, such a decree could not be made.

"The majority of the Court now applied the same rule in the case of *Orchard vs. Hughes*, although it was decided by a Territorial court. Following out the principle involved in that decision, we subsequently, in the case of *Dunphy vs. Kleinsmith*, reversed a judgment of the Supreme Court of Montana, on the ground that the case (being in the nature of a creditor's bill filed to reach property which the debtor had fraudulently conveyed) was a clear case of equity, while the proceedings therein exhibited no resemblance to equity proceedings, there being a trial by jury, a verdict for damages, and a judgment on the verdict. . . .

"On a careful review of the whole subject, we are not satisfied that the decisions are founded on a correct view of the law."

And quoting certain portions of the organic act of Montana, one of which provided that its "Supreme and District Courts

\* *Hornbuckle vs. Toombs*, 18 Wall., 652.

respectively shall possess chancery as well as common-law jurisdiction," he went on to say :

"Now here is nothing which declares, as the process Act of 1792 did declare, that the jurisdictions of common law and chancery shall be exercised separately, and by distinct forms and modes of proceeding. The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that Congress intended them to be exercised in that way. But it is well known that, in many States of the Union, the two jurisdictions are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the Circuit and District Courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side ; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice.

"In most cases it is difficult to see any good reason why an equitable right should not be enforced, or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the States, and must be considered as having been well known to Congress, and when the latter body, in the organic act, simply declares that certain Territorial courts shall possess both jurisdictions, without prescribing how they shall be exercised, the passage by the Territorial Assembly of a code of practice which unites them in one form of action, can not be deemed repugnant to such organic act."

Notwithstanding these decisions of the highest courts of this State and of the United States, a vague impression lingers in some minds, which finds expression now and then, that there is, after all, some distinction in the nature of things between law and equity, between legal rights and equitable rights. We have been so long accustomed to hearing of legal estates and equitable estates, of legal remedies and equitable remedies, that we are apt to drift, before we are aware, into the belief that Nature herself has ordained a distinction between the two, and that the world is divided into things legal and things equitable. For this cause, I think it will not be time wasted if I attempt to go a little into the reason of the matter, to show, as I think I can, that there is nothing substantial in the distinction, which is, after all, little more than a play upon words.

All that we can fairly gather from their debates of the intentions of the framers of our own State Constitution is, that they did not intend to express an opinion on the subject one way or the other. But, if the framers of the Federal Constitution had intended both to "recognize and *establish* the distinction between law and equity," they would naturally have manifested their intention by unmistakable language. They understood the force of words, and there was no motive for concealing their intentions. The debates in the Convention do not show the intention supposed, nor do the outside discussions. Two of the most powerful States, Pennsylvania and Massachusetts, not only had no courts of equity, but they had no equity practice in their ordinary courts. It is most improbable, therefore, that their statesmen should have wished to establish and perpetuate such a distinction.

Fusion of law and equity is an expression common in England, though little used in this country. We express the same general idea by the phrase, union' of legal and equitable remedies. When it is said that the two jurisdictions are so essentially distinct that there can be no real union, or that, if a union were possible, it is forbidden by the State and Federal Constitutions, it is in effect declared that we are bound hand and foot to a system of dual justice; and that the great faculty of rendering judgment according to right is not and can not be one. Two distinct questions are thus involved in the general inquiry, one whether law and equity are in the nature of things incapable of fusion; the other, whether if the fusion be possible by nature, it is made impossible by organic law.

To the former question, the answer is perfect, that throughout Continental Europe the separation of law and equity is at present unknown. Rights are in general the same as in England and America. There is no impediment, therefore, *in the nature of things*, to the perfect union of law and equity, or, to express differently the same idea, to the complete obliteration of every distinction between them.

The classification in our jurisprudence of rights as legal or equitable follows, and is created by the different jurisdictions. Instead of the two classes of rights being made the reason or the pretext for two jurisdictions, the truth is, that the two

jurisdictions are the reasons or the pretexts for the classification.

Are there not, however, legal rights and equitable rights? Certainly there are, but only because there are legal remedies and equitable remedies. Once abolish the distinction between the latter, and the distinction between the former perishes with it. Where the two systems exist in their natural vigor, a plaintiff may recover judgment in a court of law, and the defendant may recover against him in a court of equity, to prevent the execution of the first judgment. A rational and commendable state of things truly! And yet it prevailed in this State until 1848, and in England until 1875. I once heard Lord Westbury denounce as "a shame, that a plaintiff should be able to recover judgment on one side of Westminster Hall, and on the other side be branded as a fraudulent rogue for having recovered it."

Are there not, nevertheless, legal and equitable estates? Yes, but are they not so simply because they are recognized as such by the legal and equitable courts? A legal estate is one cognizable in a court of law, an equitable estate is one cognizable in a court of equity. What other distinction is there between them? And if there be none, then they disappear the moment the two courts and the two modes of procedure are blended.

In some of the statutes, framed upon the principles of the New York Code, there is an express provision that, when the legal and equitable rules clash with each other, the latter shall prevail. Such a provision may be expedient, from abundant caution, but I conceive it nevertheless to be unnecessary, because it is implied in the blending of the procedure.

Seeing, now, that the distinction between law and equity is not a natural one, but wholly artificial, let us come to the second question, whether this artificial distinction, besides being recognized, is established by the Constitutions of this State and the United States, a question which I would now consider upon the text of the Constitutions alone, without regard to the decisions already made, as I have stated, by the highest courts of the two governments.

For this purpose I can do no better than to suppose a case

by way of illustration. Let us suppose that a people had inherited two systems of courts, one for men and the other for women, and that the courts in which men were plaintiffs were called courts of law, with one form of proceeding and a jury, and those in which women were plaintiffs were called courts of equity, with a different form of proceeding and no jury, and that this people, in changing their constitution, had provided for a new court with "general jurisdiction in law and equity," would it be a sound argument that in the new court there must be one form of procedure where a woman was plaintiff and another for a man? Do not smile at the illustration, and say that the supposition is absurd, because no people could ever be so besotted as to establish different courts for different sexes. If the reason of the thing be alone considered, this would be no more absurd than to have a court of equity to give judgment on a mortgage, and a court of law to give it on the accompanying bond, as was once the case in New York, and is now the case no doubt in several of the States. We know how it happened that we had our courts of law and courts of equity; and that the reason, if reason it may be called, was purely historical; for no people under the sun would ever think of constructing, if they had not inherited, two such systems.

There are other provisions of the two Constitutions that must not be lost sight of, in our examination of the subject.

The Constitution of New York has two: one, that "the testimony in equity cases shall be taken in like manner as in cases at law, and, except as herein otherwise provided, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that they have heretofore exercised"; and the other, that "the trial by jury in all cases, in which it has been heretofore used, shall remain inviolate for ever." Neither presents the least difficulty. Taking testimony in the same way in the two classes of cases tends rather to unite than to separate them. And as to the cases in which trial by jury has been heretofore used, it is easy to enumerate or describe them. They *have been* described as cases for the recovery of money, land, or chattels, and perhaps for divorce. I have not heard that any one has yet found a defect in the description.

In the Constitution of the United States there is the provision, that the judicial power of the Union shall extend also to "all cases of admiralty and maritime jurisdiction," and by the seventh amendment it is declared that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." The expression "law or equity" occurs also in the eleventh amendment, but it signifies nothing more than the Constitution had already signified.

Reasoning upon the same theory as that which I have endeavored to prove unsound, some persons not over-discreet have insisted that the grant of admiralty jurisdiction requires the preservation of the old admiralty forms. Mr. Edwin W. Stoughton, it is said, once went to Washington to convince somebody in authority of the unconstitutionality of the bill, relieving the Supreme Court from the drudgery of reviewing the evidence on appeals in admiralty, but he appears to have convinced nobody. The "suits at common law," mentioned in the seventh amendment, can be enumerated or described as well as they have been described in New York, and the "rules of the common law," applicable to the reëxamination of fact tried by jury, can easily be written down. Indeed, if the argument derived from this amendment in favor of preserving the distinction between law and equity were good for anything, it would be equally good for preserving the different forms of actions at common law. Congress would be incompetent to obliterate the distinctions between assumpsit and covenant, case and trespass, and the courts of the United States would be required for ever to administer justice according to all the monstrous forms which prevailed in England in 1787, and which the good sense of the English people cast away one by one at first, and has at last rejected altogether.

The general distinction between legal and equitable relief—that is, between relief in the courts of law and in the courts of equity—was, that the former was compensatory and the latter specific. To say that compensatory relief was not specific, or specific compensatory, was merely uttering a truism, like say-



ing that a man was not a woman ; but to infer thence that both kinds of relief could not be had in the same action, either alternatively, or one for part of the demand and the other for the residue, was as palpable a *non sequitur* as ever fell from flippant lips.

Pursuing the illustration already begun, let us suppose that the country which, having a court of law for men and a court of equity for women, had, in the revision of its Constitution, declared that testimony should be taken in the same manner in both courts ; that the trial by jury as before used should be inviolate for ever, or that in suits at common law, that is, in the men's cases, where the value in controversy exceeded twenty dollars, the right of trial by jury should be preserved, and that no fact tried by a jury should be otherwise reëxamined in any court than according to the course of the men's courts, what would hinder the establishment of a new court for both classes of cases, with uniform pleadings, a uniform manner of taking testimony, trial by jury in every case in which a man was the suitor, and the reëxamination of a verdict only after the manner practiced in men's courts ? It would, therefore, be as possible as it would be expedient, in such a reconstruction of courts, to establish the fundamental rule that the distinction between actions for men and suits for women, and the forms of all such actions and suits theretofore existing, should be abolished, and there should be thereafter but one form of action for men and women, to be denominated a civil action ; and although Mr. Justice S. and Mr. Justice D. might, with the utmost solemnity, declare it to be legally impossible, because the mention of the two in the Constitution "*recognized and established*" the distinction between them, yet the world would insist, nevertheless, that it was both possible and proper that men and women should enter into the same door of the judicial temple, stand before the same Judge, and receive the same measure of justice.

Was it not, then, constitutionally possible, notwithstanding the protests that fell from the bench and came up from the bar, to enact, as was done in the New York Code, that "the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abol-

of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action"? Were not the arguments to the contrary futile and frivolous? And is it not time for the classification to disappear from our reports, our digests, our rules of courts, and our nomenclature? Why should we be invited to an equity term, as distinguished from a law term of a court? Why should opinions delivered from the bench continue to be sprinkled with such expressions as these: "The remedy is in equity," "This is proper for a court of equity," "We are sitting as a court of equity"? They tend to keep up a distinction that no longer exists, and go far to confuse and mislead.

There will be resistance, of course, as there always is, to every advancing movement, and there will be oscillations, as the tide comes in, a forward and a backward wave, but the tide rises nevertheless, and the flood sweeps on. So may it ever be; so will it be, and they who think to breast the waters will be engulfed, with their characters for sense and their hopes.











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